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Title: Equal Employment Opportunity Commission, Petitioner
v.
Commercial Office Products Company

Docketed:
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Court: United States Court of Appeals
for the Tenth Circuit

Counsel for petitioner: Solicitor General

Counsel for respondent: Stone,James L.

Entry	Date	Note	Proceedings and Orders
1	Mar 12 1987		Application for extension of time to file petition and order granting same until April 22, 1987 (White, March 16, 1987).
2	Apr 22 1987	G	Petition for writ of certiorari filed.
4	May 20 1987	X	Brief of respondent Commercial Office Products in opposition filed.
3	May 26 1987		DISTRIBUTED. June 11, 1987
5	Jun 2 1987	X	Reply brief of petitioner EEOC filed.
6	Jun 15 1987		Petition GRANTED.
			**********
8	Jul 16 1987		Order extending time to file brief of petitioner on the merits until August 27, 1987.
9	Aug 1 1987		Record filed.
11	Aug 27 1987		Brief of petitioner EEOC filed.
13	Aug 27 1987		Brief amici curiae of Colorado, et al. filed.
14	Aug 27 1987		Joint appendix filed.
12	Aug 28 1987		Lodging from Colorado received.
15	Sep 29 1987		Brief amicus curiae of Equal Employment Advisory Council filed.
16	Sep 29 1987		Brief of respondent Commercial Office Products filed.
17	Nov 20 1987		CIRCULATED.
18	Nov 23 1987		SET FOR ARGUMENT. Wednesday, January 13, 1988. (4th case).
19	Jan 6 1988	X	Reply brief of petitioner EEOC filed.
20	Jan 13 1988		ARGUED.

PETITION FOR WRIT OF CERTIORARI

In the Supreme Court of the United States

OCTOBER TERM, 1986

EQUAL EMPLOYMENT OPPORTUNITY COMMISSION,
PETITIONER

v.

COMMERCIAL OFFICE PRODUCTS COMPANY

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

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QUESTION PRESENTED

Whether a state agency's routine decision to defer initial processing of a discrimination charge to the Equal Employment Opportunity Commission (EEOC), pursuant to a worksharing argeement, constitutes a "terminat[ion]" of state proceedings within the meaning of Section 706(c) of Title VII of the Civil Rights Act of 1964, 42 U.S.C. 2000e-5(c), so that the EEOC may immediately deem the charge as filed, rather than being required to wait until sixty days after the commencement of state proceedings.

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases:

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OCTOBER TERM, 1986

No.

EQUAL EMPLOYMENT OPPORTUNITY COMMISSION,
PETITIONER

v.

COMMERCIAL OFFICE PRODUCTS COMPANY

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

The Solicitor General, on behalf of the Equal Employment Opportunity Commission, petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Tenth Circuit in this case.

OPINIONS BELOW

The opinion of the court of appeals (App., *infra*, 1a-20a) is reported at 803 F.2d 581. The order of the district court (App., *infra*, 23a) is not yet reported.

JURISDICTION

The judgment of the court of appeals (App., *infra*, 21a) was entered on October 15, 1986. A petition for rehearing was denied on December 23, 1986 (App., *infra*, 22a). By order dated March 16, 1987, Justice White extended the time for filing a petition for a writ of certiorari to and including April 22, 1987. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATUTORY PROVISIONS INVOLVED

Section 706(c) of Title VII of the Civil Rights Act of 1964, 42 U.S.C. 2000e-5(c), provides in pertinent part:

> In the case of an alleged unlawful employment practice occurring in a State or political subdivision of a State, which has a State or local law prohibiting the unlawful employment practice alleged and establishing or authorizing a State or local authority to grant or seek relief from such practice or to institute criminal proceedings with respect thereto upon receiving notice thereof, no charge may be filed under subsection (a) of this section by the person aggrieved before the expiration of sixty days after proceedings have been commenced under the State or local law, unless such proceedings have been earlier terminated * * *.

Section 706(e) of Title VII of the Civil Rights Act of 1964, 42 U.S.C. 2000e-5(e), provides in pertinent part:

> A charge under this section shall be filed within one hundred and eighty days after the alleged unlawful employment practice occurred * * * except that in a case of an unlawful employment practice with respect to which the person aggrieved has initially instituted proceedings with a State or local agency with authority to grant or seek relief from such practice or to institute criminal proceedings with respect thereto upon receiving notice thereof, such charge shall be filed by or on behalf of the person aggrieved within three hundred days after the alleged unlawful employment practice * * *.

STATEMENT

This case concerns the meaning of Section 706(c) and (e) of Title VII of the Civil Rights Act of 1964, 42 U.S.C. 2000e-5(c) and (e), which establishes limitation periods for the filing of employment discrimination charges with the

Equal Employment Opportunity Commission (EEOC). The court of appeals affirmed the district court's denial of the EEOC's petition to enforce an administrative subpoena issued to respondent, Commercial Office Products Company, in investigating a discrimination charge filed with the EEOC against Commercial Office Products. The court of appeals held that the EEOC could not process the charge because it had not been timely filed.

1. In Title VII of the Civil Rights Act of 1964, 42 U.S.C. 2000e, Congress attempted to coordinate federal and state efforts to resolve charges of employment discrimination over which both the EEOC (under Title VII) and a state or local fair employment practice agency (under state or local law) have jurisdiction. Under Section 706(e) of Title VII, 42 U.S.C. 2000e-5(e), a complainant must file charges with the EEOC within 180 days of the alleged discrimination, except that a complainant is allowed 300 days if he has "initially instituted proceedings with a State or local agency with authority to grant or seek relief." When the 300-day limitations period is applicable, however, Section 706(c), 42 U.S.C. 2000e-5(c), provides that a charge is not deemed to be "filed" with the EEOC "before the expiration of sixty days after proceedings have been commenced under the State or local law, unless such proceedings have been earlier terminated." Hence, when there is a state or local agency with concurrent jurisdiction, a charge will always be timely filed with the EEOC if, following its submission to the EEOC, state or local proceedings are commenced within 240 days of the discriminatory act, while a charge submitted after 240 days will be timely filed only if the state or local agency "terminate[s]" those proceedings by the 300th day.

Congress also authorized the EEOC to cooperate with state and local agencies by entering into "written agreements" with those agencies in order to promote "effective enforcement" of Title VII. See 42 U.S.C.

2000e-8(b); see also 42 U.S.C. 2000e-4(g)(1). Accordingly, the EEOC has entered into "worksharing agreements" with approximately 80 of the state and local fair employment practice agencies that enforce state and local employment discrimination laws. These agreements typically provide that the state agency will initially process certain categories of charges and that the EEOC will initially process others, with the state waiving its right to the 60-day exclusive processing period in the latter instance. See 29 C.F.R. 1601.13(c). In either instance, the deferring agency normally reserves the right to review the initial processing agency's findings of fact, which are accorded "substantial weight," and, if appropriate, also to investigate a charge further after the initial processing agency has completed its proceeding. See 42 U.S.C. 2000e-5(b).

2. On March 26, 1984, the complainant, Suanne Leerssen, submitted a charge to the EEOC, alleging that on June 10, 1983—290 days earlier—respondent, Commercial Office Products Company, had discharged her because of her sex (App., *infra*, 2a, 25a). On March 30th, the EEOC transmitted a copy to the Colorado Civil Rights Division, which had concurrent jurisdiction over the charge, and which on April 4, 1984, declined to "initially process" the charge pursuant to a worksharing agreement between the EEOC and the state agency (*id.* at 2a, 26a-27a). On that same day, the state agency sent a letter to the complainant, which advised her that "[t]o avoid duplication of effort, the * * * Division will take no action on your charge until the [EEOC] terminates its proceedings" (*id.* at 2a, 28a-29a).

The EEOC proceeded to investigate complainant's charge. Pursuant to its investigation, the EEOC, on September 20, 1984, issued a subpoena for production of information that respondent refused to provide to the EEOC (App., *infra*, 2a, 30a-32a). Respondent refused to

comply with the subpoena, however, and the EEOC initiated this action for judicial enforcement of the subpoena (*id.* at 2a, 33a-37a).

3. The district court dismissed the EEOC's action on the ground that the complainant's charge was not timely filed (App., *infra*, 2a). According to the court, the Colorado Civil Rights Division's decision not to "initially process" the charge did not constitute a "terminat[ion]" of the state proceeding, within the meaning of Section 706(c) of Title VII, 42 U.S.C. 2000e-5(c), and therefore the charge was not "filed" with the EEOC until 60 days after its receipt, which was beyond the 300-day limitations period established by Section 706(e) of Title VII, 42 U.S.C. 2000e-5(e). App., *infra*, 2a-3a.[1]

4. The court of appeals affirmed (App., *infra*, 1a-20a). The court first rejected the claim that the 300-day limitations period was inapplicable because the Colorado Civil Rights Divison had never "initially instituted proceedings," within the meaning of Section 706(e). App., *infra*, 5a-6a. The court disagreed with the Fourth Circuit's decision in *Dixon* v. *Westinghouse Electric Corp.*, 787 F.2d 943 (1986), petition for cert. pending, No. 86-181, and held that a state agency's deferral of a charge to the EEOC pursuant to a worksharing agreement "is an initial filing in the state agency sufficient to invoke the 300-day time limitation" (App., *infra*, 5a).

The court of appeals ruled, however, that the complainant's charge was not filed within 300 days and therefore the EEOC lacked authority to issue the subpoena (App., *infra*, 7a-16a). According to the court of appeals, a state

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[1] On June 14, 1984, following the district court's decision, the Colorado Civil Rights Division wrote the complainant a letter stating that the Division had never had jurisdiction over her charge because it had not been filed with the Division within the limitations period provided by state law (180 days) (App., *infra*, 55a-56a).

agency "terminates" its "proceedings," within the meaning of Title VII, only when it "completely surrenders its jurisdiction over a charge" (*id.* at 9a). Hence, the court concluded, where, as in this case, the state agency waived initial processing, yet retained jurisdiction over the charge and reserved the right to act after the EEOC terminated its proceedings, the state agency did not terminate its proceedings and therefore under Section 706(c) of Title VII the charge was not formally "filed" with the EEOC until 60 days after the charge was first filed with the state (App., *infra,* 12a-16a).

The court stated that a contrary construction of Title VII would be inconsistent with congressional intention "that the state would act during its period of exclusive jurisdiction, and that the federal authorities would begin proceedings only if state proceedings failed to resolve the dispute" (App., *infra,* 9a-12a (emphasis omitted)). On that same ground, that court also questioned whether worksharing agreements could "substitute" for the deferral to state proceedings required by Title VII (*id.* at 12a-13a). It expressly disagreed with the First Circuit's decision in *Isaac* v. *Harvard University,* 769 F.2d 817 (1985), which had upheld the EEOC's view that a state agency's decision to waive initial processing constitutes a "terminat[ion]" of its "proceedings," within the meaning of Section 706(c). App., *infra,* 8a-9a & nn.6-7.

Finally, the court found that the complainant's charge had not been timely filed with the EEOC in this case because the obligatory 60-day waiting period ended beyond the 300-day limitations period (App., *infra,* 14a-16a). For this same reason, the court concluded that the EEOC lacked authority to issue the subpoena (*id.* at 16a).[2]

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[2] The court also rejected (App., *infra,* 15a n.14) the notion that the Colorado Civil Rights Division had terminated its proceedings prior to the 300th day because, as stated in its June 14th letter to the complainant (see note 1, *supra*), the charge was filed after the state limitations period had run and therefore the agency "at no time had jurisdiction over [the] charge." The court found that the state limitations period was not self-executing and therefore the Colorado agency did possess jurisdiction at least until it wrote the letter to the complainant on June 14th, which was after the federal limitations period had run.

Judge McKay dissented (App., *infra,* 17a-20a), contending that the meaning of "terminated" in Section 706(c) is ambiguous and the court should therefore defer to the EEOC's reasonable interpretation, which is consistent with congressional intent to resolve doubts in favor of claimants and which has been upheld by every other court (except one district court) that has addressed the issue, including the First Circuit.

5. The EEOC filed a petition for rehearing and suggestion for rehearing en banc, which the court of appeals denied (App., *infra,* 22a). Judges McKay, Logan, and Seymour voted in favor of rehearing en banc.

REASONS FOR GRANTING THE PETITION

The decision of the court of appeals misconstrues a statutory provision intended to allow state and local agencies the opportunity of an exclusive period for processing charges of employment discrimination. Under the court of appeals' view, the EEOC must defer processing a discrimination charge even when the state or local agency has agreed that the EEOC should proceed immediately, and even when the charge will otherwise be barred by the applicable federal statute of limitations. That decision frustrates Congress's clear intent "to encourage the prompt processing of all charges of employment discrimination" (*Mohasco Corp.* v. *Silver,* 447 U.S. 807, 825 (1980)), and needlessly prevents consideration of some charges. In addition to these concerns, the decision below squarely conflicts with a decision of the First Circuit, and it presents an

issue of importance to the EEOC, which is responsible for implementation of Title VII's nondiscrimination mandate. Accordingly, this Court's review is warranted.

1. Section 706(c) of Title VII provides that an employment discrimination charge may not be "filed" with the EEOC before the expiration of 60 days after commencement of any state or local proceedings under state or local law concerning the same allegations, "unless such proceedings have been earlier terminated." The court of appeals ruled that state or local proceedings are "terminated," within the meaning of the federal statute, only when the state or local agency "completely surrenders its jurisdiction over a charge" and, hence, agency "proceedings" have not been "terminated" when an agency declines its right to initial processing, yet retains jurisdiction (App., *infra*, 9a, 15a). We disagree.

Contrary to the court of appeals' decision (App., *infra*, 8a-9a), the meaning of neither "terminated" nor "proceedings" is unambiguous in this context. As noted by Judge McKay in dissent (*id.* at 17a-18a), the plain meaning of the word "terminated" is not to "completely surrender[] * * * jurisdiction over a charge." "Terminated" may, of course, simply refer to a "cessation in time" and does not necessarily contemplate a cessation for all time. See *Webster's Third New International Dictionary* (Merriam-Webster ed. 1976) ("to bring to an ending or cessation in time, sequence, or continuity"). There is also no suggestion in the statutory language that Congress equated "proceedings" in this context with "jurisdiction" or that Congress otherwise unequivocally intended that state or local "jurisdiction" be forever abandoned. Instead, the term "proceedings," like the term "terminated," is ambiguous and its meaning depends upon its statutory context. Compare *North Carolina Department of Transportation* v. *Crest Street Community Council, Inc.*, No. 85-767 (Nov. 4, 1986), slip op. 5-9 with *New York Gaslight Club, Inc.* v. *Carey*, 447 U.S. 54, 60-66 (1980). For this reason, further consideration of the purpose of the provision, including an examination of the relevant legislative history, is warranted in construing Section 706(c).

The purpose of Section 706(c)'s deferral requirement, as reflected in the legislative history, supports the EEOC's view that a state or local agency has "terminated" its "proceedings" when it declines initially to process a discrimination charge. The provision for deferral to state proceedings was inserted in the Civil Rights Act of 1964 largely to ensure that state and local agencies would have "every opportunity to employ their experience without premature interference by the Federal Government." 110 Cong. Rec. 12724-12725 (1964) (remarks of Sen. Humphrey); see also *id.* at 8193 (remarks of Sen. Dirksen). Contrary to the court of appeals' unsupported assertion, the legislative history reveals no "unmistakable intention of Congress * * * that the state would act during its period of exclusive jurisdiction" (App., *infra*, 11a-12a (emphasis omitted)).[3] Instead, as described in decisions of this Court, the EEOC's sole statutory obligation is to ensure that the states have a "prior *opportunity* to consider discrimination complaints." *Love* v. *Pullman Co.*, 404 U.S. 522, 526 (1972) (emphasis added); see *EEOC* v. *Shell Oil Co.*, 466

[3] Nor, as discussed at page 13, *infra*, do worksharing agreements "subvert the statutory scheme requiring deferral" or "circumvent[] the clear statutory framework" by providing that the EEOC will generally undertake the initial processing of certain categories of charges (App., *infra*, 12a, 13a). These agreements, such as the worksharing agreement entered into by the Colorado Civil Rights Division and the EEOC (*id.* at 45a-54a), express a state agency's voluntary decision to waive its statutory right to an exclusive period of processing for certain charges. In Title VII, Congress intended to ensure that the EEOC would cooperate with state agencies and that discrimination charges would be promptly and efficiently resolved. Worksharing agreements serve both those purposes.

U.S. 54, 63 n.12 (1984); *Mohasco Corp.* v. *Silver*, 447 U.S. at 810; *New York Gaslight Club, Inc.* v. *Carey*, 447 U.S. at 63; *Oscar Mayer & Co.* v. *Evans*, 441 U.S. 750, 761 (1979).

Hence, when, as in this case, the state agency has waived its right initially to process a discrimination charge so that the EEOC may immediately process the charge,[4] the statutorily-required "opportunity" has been satisfied. There is no sound statutory purpose to be served in those circumstances by requiring the EEOC, as would the court of appeals in this case, to delay its processing for 60 additional days. To the contrary, the court of appeals' decision frustrates Congress's clear intent "to encourage the prompt processing of all charges of employment discrimination." *Mohasco Corp.* v. *Silver*, 447 U.S. at 825; see S. Rep. 92-415, 92d Cong., 1st Sess. 24 (1971); see also *Love* v. *Pullman Co.*, 404 U.S. at 526

The harm caused by such a requirement is not confined, moreover, to needless delay. As illustrated by the circumstances of this case, the court of appeals' decision may render untimely discrimination charges received by the EEOC within the 300-day limitations period established by Title VII. The EEOC, the state agency, and the individual complainant may all want the EEOC to begin processing the charge immediately, but, according to the court of appeals, the EEOC may not do so even though any further delay will place the charge outside the limitations period. A charge submitted to the EEOC is therefore too early until it is too late, notwithstanding the state agency's desire for immediate EEOC processing. We cannot suppose that Congress intended such a purposeless and perverse result, "particularly * * * in a statutory scheme in which laymen, unassisted by trained lawyers, initiate the process" (*Love* v. *Pullman Co.*, 404 U.S. at 527).

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[4] See App., *infra*, 49a ("In order to avoid delay * * *, CCRC hereby waives its exclusive right to process those charges for 60 days * * * so that EEOC can take immediate action on such charges.").

2. As the court of appeals acknowledged (App., *infra*, 8a-9a), its decision squarely conflicts with the First Circuit's decision in *Isaac* v. *Harvard University*, 769 F.2d 817, 820-828 (1985). Indeed, with one exception, every district court that has previously addressed the issue has upheld the EEOC's view. See *Hamel* v. *Prudential Insurance Co.*, 640 F.Supp. 103, 107 n.2 (D. Mass. 1986); *EEOC* v. *Ocean City Police Dep't*, 617 F. Supp. 1133, 1140-1141 (D. Md. 1985), aff'd on other grounds, 787 F.2d 955, reh'g granted, 795 F.2d 368 (4th Cir. 1986); *Hatzopoulou* v. *American Steel Foundries*, 39 Fair Empl. Prac. Cas. (BNA) 372 (N.D. Ill. 1985); *Thompson* v. *International Ass'n of Machinists*, 580 F. Supp. 662, 665-667 (D.D.C. 1984); *Yeung* v. *Lockheed Missiles and Space Co.*, 504 F. Supp. 422, 424 (N.D. Cal. 1980); *Cattel* v. *Bob Frensley Ford, Inc.*, 505 F. Supp. 617, 619 (M.D. Tenn. 1980); *Lombardi* v. *Margolis Wines & Spirits, Inc.*, 465 F. Supp. 99, 101-102 (E.D. Pa. 1979); see also *Stiessberger* v. *Rockwell International Corp.*, 29 Fair Empl. Prac. Cas. (BNA) 1273, 1274 (E.D. Wash. 1982); *Morgan* v. *Sharon Pennsylvania Bd. of Education*, 445 F. Supp. 142, 145 (W.D. Pa. 1978); *Greenlow* v. *California Dep't of Benefit Payments*, 413 F. Supp. 420, 424 (E.D. Cal. 1976); *EEOC* v. *Rinella & Rinella*, 401 F. Supp. 175, 184 (N.D. Ill. 1975); but see *Klausner* v. *Southern Oil Co.*, 533 F. Supp. 1335 (N.D.N.Y. 1982).[5]

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[5] As acknowledged by the Tenth Circuit (App., *infra*, 5a-6a), its decision also squarely conflicts with the decision of the Fourth Circuit in *Dixon* v. *Westinghouse Electric Corp.*, 787 F.2d 943 (1986), petition for cert. pending, No. 86-181, involving the related issue whether the 300-day limitations period applies where the EEOC and the state or local agency have entered into a worksharing agreement that provides that the EEOC rather than the state or local agency will initially process the complainant's charge. The Fourth Circuit in *Dixon* held that the 300-day limitations period was inapplicable, while the Tenth Circuit in this case held that the 300-day limitations period was applicable. We filed a brief in support of the petition in *Dixon*.

Unlike the Tenth Circuit in this case, the First Circuit in *Isaac* held that "when a state agency * * * suspend[s] the processing of a claim and look[s] to the EEOC for further action[,] the state agency has 'terminated' its 'proceedings' within the meaning of section 706(c)" (769 F.2d at 825). The court found ambiguity in the meaning of both "terminated" and "proceedings" and further concluded that "each [was] capable of bearing an interpretation of some cessation short of an ultimate and final disposition" (769 F.2d at 820-822). The court then examined the relevant legislative history, and, unlike the Tenth Circuit, found that the legislative history clearly established "that Congress did not intend section 706(c) to bar EEOC jurisdiction once a state has waived its exclusive claim to a case" (769 F.2d at 823). See *id.* at 824 ("once a state agency declines the full sixty days of deferral, the legislative history suggests that section 706(c) no longer has a purpose"). Finally, the First Circuit, unlike the Tenth Circuit, flatly rejected the notion "that the only way for a state agency to reduce the 60-day deferral period is to completely relinquish a case" (769 F.2d at 825). Such a requirement, the court stressed, "would serve no purpose," "would undermine [the] express goal of Title VII * * * [that] 'cases [be] processed promptly' " and "would seem to detract from, rather than further, the states' rights approach Congress sought to implement." *Ibid.* (quoting S. Rep. 92-415, 92d Cong., 1st Sess. 24 (1971)).

3. Review is also warranted because the decision of the court of appeals frustrates important congressional policies and threatens to impede the EEOC's efficient operation. As discussed above, Congress desired efficient and prompt processing of Title VII employment discrimination charges and intended to ensure EEOC cooperation with its counterparts in the states. In furtherance of those ends, the EEOC has entered into worksharing agreements with 43 states, the District of

Columbia, Puerto Rico, and the Virgin Islands, and approximately 35 municipal agencies. These agreements typically provide (see, *e.g.*, App., *infra*, 47a-49a) that the state agency waives its right to an exclusive period of processing for certain charges initially received by the EEOC, without completely relinquishing jurisdiction.[6]

Unless overturned, the court of appeals' decision means that the EEOC will have to delay, for no purpose, its investigation of discrimination charges or the agreements will have to be revised to provide that the state agency relinquishes completely its jurisdiction over certain charges. Either option frustrates important congressional policies. The former defeats the congressional goal of efficient processing of employment discrimination charges. The latter, ironically, results in precisely the sort of unnecessary intrusion on state jurisdiction that Congress intended to avoid by enacting Section 706(c).

Finally, the decision of the court of appeals threatens to render untimely approximately 219 Title VII employment discrimination charges now pending within the Tenth Circuit that were received by the EEOC more than 240 days after the alleged discriminatory act, as well as the numerous charges that will similarly be received by the EEOC beyond 240 days in the future. There are also likely thousands of pending discrimination charges nationwide, the timeliness of which has been placed in doubt by the decision in this case.[7]

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[6] For instance, within the Tenth Circuit, none of the worksharing agreements entered into between the EEOC and the respective state fair employment practice agencies, with the possible exception of Oklahoma, appears to contemplate a complete relinquishment of agency jurisdiction upon waiver of the right to a period of exclusive processing.

[7] For example, between October 1, 1985 and May 16, 1986, the EEOC received approximately 2,052 Title VII employment discrimination charges beyond 240 days.

CONCLUSION

The petition for a writ of certiorari should be granted.
Respectfully submitted.

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APRIL 1987

APPENDIX A

UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

No. 85-2224

EQUAL EMPLOYMENT OPPORTUNITY COMMISSION,
PETITIONER-APPELLANT

v.

COMMERCIAL OFFICE PRODUCTS COMPANY,
RESPONDENT-APPELLEE

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLORADO
(D.C. No. 85-K-1385)

Decided OCTOBER 15, 1986

BEFORE MCKAY, SETH AND TACHA, CIRCUIT JUDGES.

TACHA, CIRCUIT JUDGE.

Petitioner Equal Employment Opportunity Commission (EEOC) appeals from the district court's denial of a petition to enforce an administrative subpoena issued to respondent Commercial Office Products (Commercial). The two issues presented by this case are whether the EEOC can challenge the scope of the subpoena enforcement proceeding and whether the charge in this case was filed timely under the 300-day filing requirement of Title VII of the Civil Rights Act of 1964. 42 U.S.C. § 2000e-5. We hold that the EEOC cannot challenge the scope of the subpoena enforcement proceeding because it failed to raise that issue before the district court. We affirm the

decision of the district court that the charge was not filed within the time limitation for filing Title VII charges with the EEOC.

Suann L. Leerssen was discharged by Commercial on June 10, 1983. She filed a charge with the EEOC on March 26, 1984—289 days after the discharge—alleging violations of Title VII of the Civil Rights Act of 1964. On March 30, 1984, the EEOC sent a copy of the charge and a charge transmittal form to the Colorado Civil Rights Division (CCRD). The form stated that the EEOC would initially process the charge pursuant to a worksharing agreement between it and the CCRD. The CCRD returned the charge transmittal form to the EEOC and indicated that the CCRD waived its right to initially process the charge. On April 4, 1984, the CCRD sent a form letter to Leerssen explaining that it had waived its right to initial processing but stating specifically that it still retained jurisdiction over her charge.

The EEOC began its investigation of the charge on March 26, 1984, the date that it initially received the charge. After Commercial refused to provide information relevant to the charge, the EEOC issued an administrative subpoena. Commercial refused to comply with the terms of the subpoena because it believed that Leerssen's charge was untimely filed and the EEOC therefore lacked jurisdiction over the charge. The EEOC filed this action seeking enforcement of the subpoena. The district court denied enforcement of the subpoena on the grounds that the filing of the Title VII charge was not timely.

I. THE SCOPE OF THE SUBPOENA ENFORCEMENT PROCEEDING

The threshold issue that we address is whether the timeliness of the charge should have been determined in a subpoena enforcement proceeding. The district court relied

on *Klausner v. Southern Oil Company of New York, Inc.*, 533 F.Supp. 1335 (N.D.N.Y. 1982) (holding that the waiver of initial processing of a Title VII charge by a state agency is not a "termination" within the meaning of § 706(c) of Title VII) in denying enforcement of the subpoena. Reliance on *Klausner* indicates that the district court decided the timeliness issue in refusing to enforce the subpoena. The EEOC argues on appeal that an enforcement proceeding is not the appropriate stage for a determination of the timeliness of a Title VII charge.[1] We expressly decline to rule on the appropriate scope of the subpoena enforcement proceeding because the EEOC did not raise this argument in the district court. An appellate court generally will not consider an issue that a party has failed to raise below. *See Neu v. Grant*, 548 F.2d 281, 287 (10th Cir. 1977). We find no exceptional circumstances justifying departure from this rule in this case. We therefore turn to the question of whether Leerssen's Title VII charge was timely filed within the limits specified in § 706, 42 U.S.C. § 2000e-5.

II. THE TIMELINESS OF THE TITLE VII CLAIM

The statutory scheme adopted by Congress in § 706 of Title VII, 42 U.S.C. § 2000e-5, displays an intent to apply different time limitations depending upon whether or not a state has an approved state civil rights enforcement agency. The statute mandates a process of preliminary deferral to the state agency in those states where such agencies exist. States are referred to as deferral or nondeferral

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[1] We are aware that a divided panel of the Fourth Circuit recently held that a subpoena enforcement proceeding is not the appropriate stage for a determination of the timeliness of a Title VII case. *EEOC v. Ocean City Police Dept.*, 787 F.2d 955 (4th Cir. 1986). The dissent in that case argued that an enforcement proceeding is an appropriate stage for such a determination, and there is language in *EEOC v. Shell Oil Company*, 466 U.S. 54, 65 (1984) to support that conclusion.

states on the basis of whether or not a state has a civil rights enforcement agency. In nondeferral states a charge must be filed within 180 days after the alleged unlawful employment practice occurred. 42 U.S.C. § 2000e-5(e). An exception to this 180-day limit applies in deferral states. Section 706(e) reads:

> [I]n a case of an unlawful employment practice with respect to which the person aggrieved has initially instituted proceedings with a State or local agency with authority to grant or seek relief from such practice * * * such charge shall be filed by or on behalf of the person aggrieved within three hundred days after the alleged unlawful employment practice occurred, or within thirty days after receiving notice that the State or local agency has terminated the proceedings under the State or local law, whichever is earlier * * *.

42 U.S.C. § 2000e-5(e). Section 706(e) must be read together with part of § 706(c):

> In the case of an alleged unlawful employment practice occurring in a State, or political subdivision of a State, which has a State or local law prohibiting the unlawful employment practice alleged and establishing or authorizing a State or local authority to grant or seek relief from such practice * * * no charge may be filed * * * before the expiration of sixty days after proceedings have been commenced under the State or local law, unless such proceedings have been earlier terminated * * *.

42 U.S.C. § 2000e-5(c).

The combination of these two subsections establishes a statutory scheme pursuant to which a claimant in a deferral state has 300 days to file a charge with the EEOC, but no such charge can be filed with the EEOC until the state agency has had up to sixty days to act on the charge. This scheme now governs in the forty-five states and nearly

sixty local and territorial jurisdictions that have civil right agencies approved under § 706.[2] 29 C.F.R. § 1601.74 (1985). Thus, the exception has become the rule.

The federal courts have continued to struggle with the time limitations for filing a Title VII charge in deferral states. The frequency with which the courts confront this issue implies that complainants in deferral states who have failed to file a charge within 180 days after the alleged unlawful employment practice occurred are confused with respect to the applicable time limitations. The confusion experienced by many complainants defeats two important congressional goals: (1) the ease of filing civil rights charges by lay complainants and (2) the timely resolution of civil rights charges. *See Love v. Pullman, Co.*, 404 U.S. 522 (1982). The subversion of these goals invites legislative action. *See* Comment, *The Procedural Filing Requirements of Title VII in Deferral States: The Need for Legislative Action*, 43 Ohio St. L.J. 675 (1982). Lacking that, however, we turn to an analysis of this case based on the text of the statute, the legislative history, and the relevant judicial interpretation.

A. The Requirements for an Initial Filing with the State Agency

The first issue that we address is whether Leerssen must have filed first with the CCRD rather than with the EEOC in order to have taken advantage of the 300-day exception to the 180-day time limitation. We have interpreted the Supreme Court decision in *Love v. Pullman*, 404 U.S. 522 (1972), to mean that when a complainant files a charge with the EEOC, the deferral of that charge by the EEOC is an initial filing in the state agency sufficient to invoke the 300-day time limitation. *Smith v. Oral Roberts Evan-*

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[2] An agency that has been authorized to review unlawful employment practices pursuant to 42 U.S.C. § 2000e-5(c) is designated a "706 agency."

gelistic Ass'n. Inc., 731 F.2d 684 (10th Cir. 1984). *But see Dixon v. Westinghouse Electric Corp.*, 787 F.2d 943 (4th Cir. 1986). As the Supreme Court said in *Love*: "Nothing in the Act [Title VII of the Civil Rights Act of 1964] suggests that the state proceedings may not be initiated by the EEOC acting on behalf of the complainant rather than by the complainant himself. . . ." 404 U.S. at 525 (footnote omitted). In this case the EEOC initiated the charge with the CCRD on behalf of Leerssen in the charge transmittal form that the EEOC sent to the state agency on March 30, 1984—the 292nd day.[3] Accordingly, Leerssen's charge with "initially instituted" with the CCRD pursuant to the requirements of § 706(e) and the 300-day limitation applies.

B. The Meaning of "Filed" in § 706(e)

Leerssen's charge is timely under § 706(e) only if it was "filed" with the EEOC within 300 days after the alleged unlawful employment practice occurred. An EEOC Procedural Regulation, 29 C.F.R. § 1601.13(a)(3), provides that a charge arising in a jurisdiction having a 706 agency that is apparently untimely under the applicable state or local statute of limitations is "filed" with the EEOC upon receipt by the EEOC. According to this view, a charge could be "filed" with the EEOC even though the state agency had exclusive jurisdiction to act on the charge. This regulation, however, ignores the clear requirement of the statute that *either* sixty days must elapse after initial institution of proceedings in the state *or* the state agency

[3] The fact that the filing with the state was past the state's 180-day limitation period does not nullify the filing with the CCRD. We have held that Title VII does not require that a charge be filed with the state or local agency or the EEOC within the time periods commanded by state law in order to preserve the right to timely file a charge within the extended federal time periods. *Smith v. Oral Roberts*, 731 F.2d at 684.

must have both commenced and terminated proceedings *before the complaint may be deemed to be filed with the EEOC*. 42 U.S.C. § 2000e-5(c). The referral of the charge from the EEOC to the state agency merely begins a period of "suspended animation" during which the state has a maximum of sixty days to resolve the charge before it can be filed officially with the EEOC. *Love*, 404 U.S. at 526. As the Court explained in *Mohasco Corp. v. Silver*, 447 U.S. 807, 821 (1980), "Congress chose to prohibit the filing of any federal charge until after state proceedings had been completed or until 60 days had passed, whichever came sooner." A contrary EEOC " 'interpretation' of the statute cannot supersede the language chosen by Congress." *Id.* at 825 (footnote omitted). *See also General Electric Co. v. Gilbert*, 429 U.S. 125, 140-43 (1976). The EEOC regulation cannot prevail here in the face of the clear statutory language of § 706(e).[4]

C. The Requirements for a Timely Filing with the EEOC

In *Mohasco*, the Supreme Court recognized that the combination of a 300-day filing limitation and a sixty-day deferral requirement means that "a complainant in a deferral State . . . need only file his charge within 240 days of the alleged discriminatory employment practice in order to insure that his federal rights will be preserved." 447 U.S. at 814 n.16. Any charges brought between the 240th day and the 300th day will be timely filed with the EEOC

[4] The court in *Seredinski v. Clifton Precision Products Co.*, 776 F.2d 56, 61-62 (3rd Cir. 1985) rejected a proposed reading of this regulation which would have held that "a charge is timely filed as long as it is received by the EEOC within 300 days from the date of the alleged violation," regardless of when proceedings commenced in the state agency. Instead, the court interpreted the regulation to require the EEOC to allow a state agency to consider a charge even though it is untimely under state law. *Id.* at 62.

only if the state agency happens to complete its proceedings before the expiration of the sixty-day deferral period and prior to the 300th day. *Id.* The mandatory sixty-day deferral period in this case did not begin to run until the 289th day after the alleged unlawful employment practice, and it did not conclude until the 349th day, well past the 300-day limit in the statute. The charge could only have been timely filed with the EEOC if the state had terminated its proceedings prior to the 300th day. We now turn to the question of what a state agency must do to terminate its proceedings under § 706(c).

1. *The Meaning of "Terminated"*

The EEOC argues that a state agency "terminates" its proceedings within the meaning of § 706(c) when the state agency waives its right to initially process a charge, defers to the EEOC, and retains jurisdiction to act after the EEOC has completed its proceedings. The First Circuit recently adopted this interpretation of "terminate" in *Isaac v. Harvard University*, 769 F.2d 817 (1st Cir. 1985). We do not agree. Such a construction of "terminate" is contrary to its plain meaning, inconsistent with settled judicial interpretations of Title VII, and a subversion of the goals Congress sought to achieve by including a deferral requirement.

The plain and ordinary meaning of "terminate" involves the end or completion of an activity.[5] We find it difficult to understand how this meaning could in any way be con-

[5] The Supreme Court in *Mohasco* twice paraphrased the termination of state proceedings requirement in § 706(c). First, it discussed a situation where "the State happens to *complete* its consideration of the charge prior to the end of the 300-day period." *Mohasco*, 447 U.S. at 814 n. 16 (emphasis added). The Court then recognized that a federal charge could not be filed "until after state proceedings had been *completed* or until 60 days had passed." *Id.* at 821 (emphasis added). This casual reference to the meaning of "terminate" in § 706(c) persuades us that the Court simply assumed what a lay reader of the provision would assume: "terminated" means completed.

troversial.[6] In the context of § 706(c), a state "terminates" its proceedings only when it completely surrenders its jurisdiction over a charge. Nor is "proceedings" ambiguous in this context.[7] The statute provides that proceedings under Title VII in a deferral state must be commenced in the state agency. The plain meaning of "proceedings" here refers to the actions that a state agency in a deferral state must take in resolving a charge brought under Title VII.

The legislative history and the judicial interpretation of Title VII explain why a state must unequivocally terminate its authority over a charge before the EEOC can commence proceedings.[8] Congress intended to require mean-

[6] The court in *Isaac* selected a definition that described "terminate" as a "temporary cessation." 769 F.2d at 821. Using this definition, a state agency could "terminate" its proceedings at one point, only to continue them in the future. We believe that this is a strained reading of the word "terminate." Additionally, we decline the invitation of *Isaac* to engage in a battle concerning which dictionary and which alternative definition is appropriate. *See Isaac*, 769 F.2d at 821.

[7] Again, the court in *Isaac* found that "proceedings" in § 706(c) referred to nothing more than the first stage of state agency proceedings on a complaint. 769 F.2d at 821. The Supreme Court has recognized that the word "proceedings" in Title VII "is used to refer to all the different types of proceedings in which the statute is enforced, state and federal, administrative and judicial." *New York Gaslight Club, Inc. v. Carey*, 447 U.S. 54, 62-63 (1980). But nowhere in the statute of the legislative history are particular stages of the state administrative proceedings distinguished. The argument in *Isaac* is circular: "terminate" can mean temporary only if there are distinct state agency proceedings, but there is no need to distinguish among stages of the state agency proceedings unless each stage can be terminated independently.

[8] In turning to the legislature history, this court, like the Supreme Court, "emphasizes that the words of the statute are not ambiguous."

ingful deferral to state agencies in order to provide for the local resolution of civil rights charges.[9] The deferral provisions were included for two purposes. First, Congress sought to encourage state and local agencies to resolve civil rights disputes. The local resolution of civil rights charges was believed to be a state responsibility.[10] The second reason for creating a deferral requirement was to prevent premature federal intervention.[11] The Supreme Court

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Mohasco, 447 U.S. at 818. Here, as in *Mohasco*, "a literal reading of . . . [42 U.S.C. §§ 2000e-5(c) and (e)] gives full effect to the several policies reflected in the statute." *Id.* at 810.

[9] The version of the Civil Rights Act passed by the House in 1964 did not include any deferral provisions. The House bill, however, met with strong opposition in the Senate. In an effort to break the deadlock during the floor debate over the measure, a bi-partisan group led by Senators Dirksen and Humphrey offered a group of amendments as a substitute for the House bill. The deferral provisions were the key to these amendments. 110 Cong. Rec. 11936 (1964).

[10] Senator Humphrey in particular stressed the responsibility of state and local officials:

> Problems of civil rights will ultimately be settled at the community level • • •. Therefore, one of the improvements I see • • • is the inclusion within the words and text of the amendment of provision for responsibility of local and State authorities to seek compliance with the law, wherever possible, through voluntary methods; and, if voluntary methods fail, to seek compliance with the law through local enforcement. If voluntary methods and local enforcement should both fail, we then have the authority to seek compliance with the law through action by the Federal Government in the courts of law. This is a commonsense and just balance of Federal and State responsibility.

110 Cong. Rec. 11936 (1964). At a later point in the debate, Senator Humphrey said, "[I]t is perfectly proper to describe the substitute package as a 'States rights bill,' and, I may say, a 'States responsibilities bill.' " 110 Cong. Rec. 12725 (1964).

[11] "We sought • • • to guarantee that these states • • • will be given every opportunity to employ their expertise and experience without premature interference by the Federal Government." 110 Cong. Rec. 12725 (1964) (statement of Sen. Humphrey).

has relied on each of these purposes in interpreting § 706(c). In *Oscar Mayer & Co. v. Evans*, 441 U.S. 750, 755 (1979), the Court wrote:

> Congress intended through § 706(c) to screen from the federal courts those problems of civil rights that could be settled to the satisfaction of the grievant in a "voluntary and localized manner." See 110 Cong. Rec. 12725 (1964) (remarks of Sen. Humphrey). The section is intended to give state agencies a limited opportunity to resolve problems of employment discrimination and thereby to make unnecessary resort to federal relief by victims of the discrimination.

Similarly, in *Mohasco*, the Court wrote: "The [legislative] history identifies only one reason for treating workers in deferral States differently from workers in other States: to give state agencies an opportunity to redress the evil at which the federal legislation was aimed, and to avoid federal intervention unless its need was demonstrated." 447 U.S. at 821 (footnote omitted).

The deferral requirement of § 706(c) accomplishes these purposes by prohibiting federal action until sixty days have passed or the state has conducted and concluded proceedings in a shorter period. Congress believed that sixty days was more than adequate for a state to complete a full investigation and determination of a case.[12] Federal resources were to be available to those state agencies that desired assistance in the processing of a charge. *See* 42 U.S.C. § 2000e-8(b). But the unmistakable intention of

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[12] Senator Dirksen note that "many cases are disposed of [by state agencies] in a matter of days, and certainly not more than a few weeks." 110 Cong. Rec. 13087 (1964). The current backlog in many state agencies and the EEOC must cause officials today to look wistfully at the period that Senator Dirksen described. It is notable, however, that it was believed that state proceedings could easily be completed within the sixty-day deferral period.

Congress was that the state would *act* during its period of exclusive jurisdiction, and that the federal authorities would begin proceedings only if state proceedings failed to resolve the dispute.

2. *The Effect of the Action by the State Agency*

In the present case, Leerssen initially filed a charge with the EEOC. The EEOC then forwarded a copy of Leerssen's charge to the CCRD. The CCRD returned the charge processing form to the EEOC, waiving the CCRD's right to "initially process" the charge. We must decide whether this process is sufficient to constitute a commencement and termination of state proceedings that complies with the statutory procedure for shortening the sixty-day deferral period.

The EEOC and the CCRD were operating under a worksharing agreement which provided, *inter alia*, that if the claimant filed initially with the CCRD, the CCRD would process the charge. Conversely, the agreement provided that if the charge were lodged initially with the EEOC, the EEOC would process the claim. Thus, the sixty-day deferral period required by § 706(c) can be avoided if the complainant does not file initially with the state agency. The Supreme Court has recognized that Title VII is "a statutory scheme in which laymen, unassisted by trained lawyers, initiate the process" *Love*, 404 U.S. at 527. But the "statutory plan was not designed to give the worker in a deferral State the option of choosing between his state remedy and his federal remedy, nor indeed simply to allow him additional time in which to obtain state relief." *Mohasco*, 447 U.S. at 821. To allow the § 706(c) requirement of state deferral to turn upon the point of initial contact by a lay complainant subverts the statutory scheme requiring deferral.

In essence, the worksharing agreement created a reverse deferral, whereby the state defers to the EEOC. The

EEOC suggests that worksharing agreements such as the one in this case may be effective and appropriate mechanisms for allocating investigatory and other enforcement responsibilities. These agreements cannot, however, become a means of circumventing the clear statutory framework and Congressional intent requiring deferral to state agencies. *See Bowsher v. Synar*, 106 S.Ct. 3181, 3193-94 (1986) ("the fact that a given law or procedure is efficient, convenient, and useful in facilitating functions of government, standing alone, will not save it if it is contrary to [law]") (quoting *INS v. Chadha*, 462 U.S. 919, 944 [1983]). Worksharing agreements cannot serve as a substitute for deferral. The deferral period can be shortened only if the state takes final and unequivocal action commencing and terminating proceedings on the charge prior to the expiration of sixty days from the date on which the charge was filed with the state agency. We must look beyond the worksharing agreement in this case to the CCRD's response to the deferral by the EEOC in order to determine whether proceedings were commenced and terminated by the CCRD before the 300th day after the alleged employment discrimination practice occurred.[13]

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[13] The EEOC cites this court's decision in *Barela v. United Nuclear Corp.*, 462 F.2d 149 (10th Cir. 1972) for the proposition that § 706(c) allows a state agency to waive its opportunity to resolve a complaint. *Barela*, to the contrary, supports our holding here. The charge in *Barela* was brought to the EEOC and referred to the state agency, "which agency returned it three days later stating that it did not intend to pursue the matter because of its heavy work load." *Barela*, 462 F.2d at 151. It appears that the state agency in *Barela* made a decision to completely relinquish its authority to act on the charge at that point *or in the future*.

We do not here decide whether a state agency may waive the required sixty-day deferral period pursuant to a worksharing agreement. That question has been alluded to, but not decided, by the Supreme Court in *Kremer v. Chemical Construction Corp.*, 456 U.S. 461, 471 n. 8 (1982) and by the Third Circuit in *Seredinski*, 776 F.2d at 61-62.

The charge transmittal form dated March 30, 1984 that the EEOC sent to the CCRD with respect to Leerssen's charge states that "a charge of employment discrimination [was] initially received by the EEOC." This form contains a number of options for further action that apparently can be selected by the EEOC and the CCRD. The top portion of the form allows for three options: (1) the EEOC will initially process the charge pursuant to the worksharing agreement; (2) the 706 agency will initially process the charge pursuant to the worksharing agreement; or (3) the worksharing agreement does not determine which agency is to initially process the charge. All three options are predicated on the worksharing agreement. Significantly, the EEOC director is to sign this portion of the charge form, so the EEOC—not the CCRD—apparently selects the option that will be followed. The box checked in this case reads: "Pursuant to the worksharing agreement, this charge is to be initially processed by the EEOC."

The bottom portion of the charge transmittal form allows the state agency to acknowledge receipt of the charge transmittal form and to indicate the intention of the state agency with respect to processing the charge. The bottom portion of the form in this case was apparently completed by a representative of the CCRD. The option chosen by the CCRD reads: "This will acknowledge receipt of the referenced charge and indicate this Agency's intention not to initially process the charge." The charge transmittal form was received by the CCRD on April 3, 1984. On April 4, 1984, the CCRD wrote to Leerssen that her case had been assigned a number for the CCRD files and that:

> [T]he Civil Rights Division *will take no action* on your charge *until* the Equal Employment Opportunity Commission terminates its proceedings. The final findings and orders of the Equal Employment Opportunity Commission *may* be adopted by the Civil Rights Division with no further action taken by our Agency.

(emphasis added).

This sequence of events shows that the CCRD simply acknowledged receipt of Leerssen's charge, waived initial processing, and retained jurisdiction reserving the right to act or to adopt the EEOC findings after the EEOC had terminated its proceedings. We cannot construe the ministerial acknowledgment of receipt of the charge transmittal form and the waiver of "*initial* processing" by the CCRD as a commencement and termination of proceedings that operates to reduce the sixty-day deferral period required by § 706(c). The CCRD did not finally and unequivocally terminate its authority over Leerssen's charge.[14] Accordingly, the CCRD had not terminated its proceedings, and the charge cannot be deemed to have been filed with the EEOC because the sixty-day deferral period had not expired.[15]

We hold only that the CCRD did not finally and unequivocally relinquish its executive jurisdiction over Leerssen's charge and therefore did not "terminate" its proceedings.

[14] On June 14, 1985, the CCRD sent Leerssen a letter stating that since the agency at no time had jurisdiction over her charge, it should not have been processed by the CCRD. Commercial argues that we should not consider this letter because it was not written until after the district court reached its decision in this case. We need not resolve this argument, for the letter does not affect the result in this case. Contrary to the position of the CCRD in the letter, the CCRD retained jurisdiction over Leerssen's charge pursuant to Rule 10.4(F)(2) of the Code of Colorado Regulations, 3 C.C.R. 701-1, which provides that the state time limits on charges bar a claim only "where the respondent objects that the charge is not timely filed." No such objection was made by Commercial before the 300-day time limit expired in this case. The June 14th letter itself could be viewed as terminating state proceedings, but since it was not written until a year after the 300-day time limit expired, it did not terminate state proceedings in time to allow the EEOC to obtain jurisdiction.

[15] The EEOC argues on appeal that the district court should have considered whether any equitable circumstances existed that would

Leerssen's charge was not received by the EEOC until the 289th day after the alleged unlawful employment practice. Section 706(c) requires that a charge alleging a unlawful employment practice in a deferral state be filed with the EEOC within 300 days of the alleged occurrence. The deferral period required by § 706(c) did not conclude until the 349th day, and the CCRD had not terminated its proceedings by the 300th day. Therefore, the charge was not timely filed with the EEOC. The judgment of the district court is therefore AFFIRMED.

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have supported a modification of the time limitations applying to Leerssen's charge. We recognize that the time limitations for filing a Title VII suit in federal court are not jurisdictional prerequisites for the court but rather are subject to equitable modification. *Zipes v. Trans World Airlines, Inc.*, 455 U.S. 385 (1982). Leerssen, who is not a party in this action to enforce the administrative subpoena, can raise any equitable arguments that she might have in seeking to persuade a court to hear her case despite her failure to file a timely charge with the EEOC. The EEOC, however, failed to argue to the district court that any equitable circumstances existed in this case that would have justified a departure from the time limitations and therefore allowed the enforcement of the administrative subpoena. We adhere to the rule that a party may not raise an issue on appeal that it did not raise before the district court. *Neu v. Grant*, 548 F.2d 281, 287 (10th Cir. 1977).

McKAY, Circuit Judge, dissenting:

The court correctly observes that:

> The federal courts have continued to struggle with the time limitations for filing a Title VII charge in deferral states. The frequency with which the courts confront this issue implies that complainants in deferral states who have failed to file a charge within 180 days after the alleged unlawful employment practice occurred are confused with respect to the applicable time limitations.

Maj. Op. at 5-6. The court also recognizes that claimants, too, often experience confusion as to the applicable time limitations. *Id.* at 6. The frequent litigation and the confusion of claimants demonstrate to me not that claimants or their lawyers are ignorant, but rather that the statutory provisions are indisputably ambiguous. Congress' concern in enacting the deferral provisions was to encourage state and local agencies to resolve discrimination problems at the local level. Congress did not intend to confuse parties who claimed to be victims of discrimination, and Congress clearly did not intend the burden of these statutory ambiguities to fall on these parties. Rather, Congress meant to liberalize the availability of redress for employment discrimination by providing two forums for the protection of victims. I do not believe that the ambiguity should be resolved by creating a trap for the unwary, as I believe the court has done in this case, or by creating a split in the circuits, thereby further intensifying the struggle and the confusion. I therefore must respectfully dissent.

The First Circuit in *Isaac v. Harvard University*, 769 F.2d 817 (1st Cir. 1985), wrote a definitive opinion dealing with the timeliness issue. I believe their analysis is correct and do not find it necessary to repeat that analysis here. However, I do wish to emphasize two points. First, there can be no doubt that the statutory provision is ambiguous.

Not only has the First Circuit in *Isaac* thoroughly demonstrated this, *id.* at 820-24, but the court here has also implicitly attested to the ambiguity by recitation of the continuing struggle in the litigated cases. Maj. Op. at 5-6. An abstract analysis of the meaning of the word "terminate" does not on its face remove the demonstrated ambiguity in the statute. Furthermore, the complexity of state involvement and activity suggests that one may not perfunctorily assign a meaning to the word "terminate" in this context. Even the majority found it necessary to interpret the word "terminate" to mean "unequivocally terminate [the state's] authority," adding words to the statute in order to reach its conclusion that the statute is unambiguous. *Id.* at 7, 11. The weight of experience and careful analysis support the conclusion that the statute is itself ambiguous.

Second, the agency involved in this case has interpreted the statute, and we are required to give deference to that interpretation when the statute is ambiguous. *See, e.g., Chevron U.S.A., Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837 (1984) (court's function when Congress is silent only to determine whether the agency interpretation is a permissible construction of the statute); *Rocky Mountain Oil and Gas Association v. Watt*, 696 F.2d 734 (10th Cir. 1983) (court must defer to agency interpretation when statute is ambiguous). Since the EEOC's interpretation of the statute is clearly rational and consistent with the statute's purpose, we should defer to that interpretation. This was the final anchor in the First Circuit's argument.

While it is true that the First Circuit's interpretation would extend the filing time for some claimants, legislative history gives no indication that Congress intended otherwise. Indeed, as the majority seems to indicate, one of Congress' purpose in this enactment was to encourage effective state action. Maj. Op. at 11. But Congress did not

intend thereby to deprive victims of discrimination access to the EEOC and to federal enforcement mechanisms. Nor is there any indication that Congress, in order to implement its purpose, intended to hold slavishly to the original 180-day provision. Such an intention would create a trap for claimants who take full advantage of state provisions before turning to the EEOC, which is their continuing right under the statute. One would have to attribute either congressional hostility to discrimination claimants or a lack of congressional concern for the inability of laypeople to understand this complex statute to suggest it intended such a result.

Even if the word "terminate" may have a clear meaning in isolation, this case amply demonstrates that it does not have a clear meaning in this context. How the claimant, or for the matter the attorney for the claimant, could know that the state agency's correspondence was not a "termination" of state proceedings is beyond me. In any event, since the EEOC statute in general, and these provisions in particular, are remedial, Congress clearly intended doubts to be resolved in favor of claimants. The First Circuit's construction of the statute in *Isaac* is fully consistent with those notions. It is not only possible but particularly likely that Congress' dual purpose was to encourage states to resolve discrimination problems and to liberally protect the interests of victims of discrimination. These purposes are best served by construing doubts about timely filing in favor of claimants.

I would therefore reverse and join the First Circuit and all the district courts that have ruled on this issue except the Northern District of New York and the trial court in the instant case. *See Isaac*, 769 F.2d at 827-28; *Equal Employment Opportunity Commission v. Ocean City Police Department*, 617 F. Supp. 1133 (D. Md. 1985), *aff'd on other grounds*, 787 F.2d 955 (4th Cir. 1986); *Thompson v. International Association of Machinists*, 580

F. Supp. 662 (D.D.C. 1984); *Douglas v. Red Carpet Corp. of America*, 538 F. Supp. 1135 (E.D. Pa. 1982); *Gunn v. Dow Chemical Co.*, 522 F. Supp. 1172 (S.D. Ind. 1981); *Yeung v. Lockheed Missiles & Space Co.*, 504 F. Supp. 422 (N.D. Cal. 1980); *Cattell v. Bob Frensley Ford, Inc.*, 505 F. Supp. 617 (M.D. Tenn. 1980); *Morgan v. Sharon Pennsylvania Board of Education*, 445 F. Supp. 142 (W.D. Pa. 1978). *But see Klausner v. Southern Oil Co.*, 533 F. Supp. 1335 (N.D.N.Y. 1982) (waiver of initial processing by state under worksharing agreement did not amount to a "termination" of state proceedings). Even if one had doubts about the ambiguity analysis, it does not seem to me that clarification or protection of victims of discrimination can be served by splitting the circuits. At the very minimum, the decisions of the First Circuit and nearly all of the district courts plus the decision of the agency involved (the EEOC) are clearly rational and not inconsistent with either congressional language or manifest purpose. I would reverse the district court's decision.

APPENDIX B

UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

No. 85-2224

EQUAL EMPLOYMENT OPPORTUNITY COMMISSION,
PETITIONER-APPELLANT

v.

COMMERCIAL OFFICE PRODUCTS CO.,
RESPONDENT-APPELLEE

DATE: OCTOBER 15, 1986

JUDGMENT

BEFORE MCKAY, SETH AND TACHA, CIRCUIT JUDGES.

This cause came on to be heard on the record on appeal from the United States District Court for the District of Colorado, and was argued by counsel.

Upon consideration whereof, it is ordered that the judgment of that court is affirmed.

/s/ ROBERT L. HOECKER
Robert L. Hoecker, *Clerk*

APPENDIX C

UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

No. 85-2224

EQUAL EMPLOYMENT OPPORTUNITY COMMISSION,
PETITIONER-APPELLANT

v.

COMMERCIAL OFFICE PRODUCTS CO.,
DEFENDANT-APPELLEE

DATE: DECEMBER 23, 1986

ORDER

Before HOLLOWAY, SETH, BARRETT, MCKAY, LOGAN, SEYMOUR, ANDERSON, TACHA AND BALDOCK.

This matter comes on for consideration of appellant's petition for rehearing and suggestion for rehearing en banc filed in the captioned cause.

Upon consideration whereof, the petition for rehearing is denied by Judge Oliver Seth and Judge Deanell R. Tacha. Judge Monroe G. McKay voted to grant rehearing.

The court having been polled on the suggestion for rehearing en banc, Rule 35, Federal Rules of Appellate Procedure, rehearing en banc is denied. Circuit Judges Monroe G. McKay, James K. Logan and Stephanie K. Seymour voted to grant rehearing en banc.

Judge John P. Moore did not participate.

/s/ ROBERT L. HOECKER
Robert L. Hoecker, *Clerk*

APPENDIX D

IN THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLORADO

No. 85-K-1385

EQUAL EMPLOYMENT OPPORTUNITY COMMISSION,
PETITIONER

v.

COMMERCIAL OFFICE PRODUCTS COMPANY,
RESPONDENT

ORDER OF DISMISSAL

This matter came on for hearing and the court having heard argument,

IT IS ORDERED that the petition to enforce administrative subpoena is denied and this complaint and civil action are dismissed.

DATED at Denver, Colorado this 6th day of June, 1985.

/s/ JOHN L. KANE, JR.
United States District Judge

APPENDIX E

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLORADO

No. 85-K-1385

EQUAL EMPLOYMENT OPPORTUNITY COMMISSION,
PLAINTIFF[S]

v.

COMMERCIAL OFFICE PRODUCTS COMPANY,
DEFENDANT[S]

MINUTE ORDER – JUDGE KANE

Judge John L. Kane, Jr. ORDERS

The motion to alter or amend judgment is DENIED.

Mary Clark, Secretary DATE: June 18, 1985

Copies of this Minute Order were mailed to the following persons:

Robert O. Romero, Esq.
Ronald W. Taoka, Esq.
EEOC
Denver District Office
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James L. Stone, Esq.
950 17th St., #1600
Denver, CO 80202

DATED: June 18, 1985

/s/ ALAN R. CASE
Deputy Clerk

APPENDIX F

APPROVED BY OMB
3046-0003
Expires 12-31-85

OF DISCRIMINATION

IMPORTANT: This form is affected by the Privacy Act of 1974; see Privacy Act Statement on reverse before completing it.

CHARGE NUMBER(S) (AGENCY USE ONLY)

STATE/LOCAL AGENCY

☒ EEOC 03184 1964

Equal Employment Opportunity Commission and Colorado Civil Rights Commission
(State or Local Agency)

NAME (INDICATE MR., MS., OR MRS.)
Ms. Suanne L. Leersßen

HOME TELEPHONE NUMBER (INCLUDE AREA CODE)
(303) 699-8122

STREET ADDRESS
7491 E. Union Dr.

CITY, STATE AND ZIP CODE
Aurora, Colorado 80013

COUNTY

NAMED IS THE EMPLOYER, LABOR ORGANIZATION, EMPLOYMENT AGENCY, APPRENTICESHIP COMMITTEE, STATE OR LOCAL GOVERNMENT AGENCY WHO DISCRIMINATED AGAINST ME (If more than one list below).

NAME
Commercial Office Products Co.

TELEPHONE NUMBER (INCLUDE AREA CODE)
(303) 373-2800

STREET ADDRESS
13800 E. 39th Ave.

CITY, STATE AND ZIP CODE
Aurora, Colorado 80011

NAME

TELEPHONE NUMBER (INCLUDE AREA CODE)

STREET ADDRESS

CITY, STATE AND ZIP CODE

CAUSE OF DISCRIMINATION BASED ON (Check appropriate box(es))

☐ RACE ☐ COLOR ☒ SEX FEMALE ☐ RELIGION ☐ NATIONAL ORIGIN ☐ OTHER (Specify)

THE MOST RECENT OR CONTINUING DISCRIMINATION TOOK PLACE (Month, day, and year)
06-10-83

THE PARTICULARS ARE The Colorado Civil Rights Commission has jurisdiction over the subject matter of this Charge; that the Respondent is subject to the jurisdiction of the Colorado Civil Rights Commission and is covered by the provisions of Colorado Revised Statutes (C.R.S. 1973, 24-34-401, et seq., as reenacted).

I. PERSONAL HARM:

On 06-10-83 I was discharged from the position of Purchasing Agent; a position I had held since May 1981.

Respondent, which sells retail office supplies, employs at or near 200 employees.

II. RESPONDENT'S REASON FOR ADVERSE ACTION:

Mr. Chuck Hamilton, Manager, had told me I was not carrying my share of the work.

III. DISCRIMINATION STATEMENT:

I believe that I was discriminated against because of my sex, inasmuch as:

A. I had received a $4,000 per year raise in late February 1983 for my excellent work as Purchasing Agent.

B. I had informed Respondent of my pregnancy on/or about 05-09-83.

C. Prior to my being discharged I had received no complaints about my work. Mr. Hamilton told me on 06-10-83 that he felt he had to do all my work.

D. To my knowledge I was replaced by a male.

Wherefore, the Charging Party prays that the Colorado Civil Rights Commission cause said Respondent to cease and desist from the unfair and discriminatory practices set forth above, and to grant other appropriate relief as may exist within the Commission's power and which the Commission may deem necessary and proper.

I will advise the agencies if I change my address or telephone number and I will cooperate fully with them in the processing of my charge in accordance with their procedures.

I declare under penalty of perjury that the foregoing is true and correct.

Date 4 March 1984 Charging Party (Signature)

NOTARY - (When necessary to meet State and Local Requirements)

I swear or affirm that I have read the above charge and that it is true to the best of my knowledge, information and belief.

SIGNATURE OF COMPLAINANT
Suanne L Leersen

SUBSCRIBED AND SWORN TO BEFORE ME THIS DATE (Day, month and year)
26, March, 1984
Mary D. Weeks

My Commission expires November 3, 1987

SEE NOTICE TO USER ON BACK OF ALL EEOC FORMS IF ANY. OBSOLETE AND MAY NOT BE USED

APPENDIX G

EQUAL EMPLOYMENT OPPORTUNITY COMMISSION

DATE March 30, 1984

EEOC CHARGE NO. 081841964

706 AGENCY CHARGE NO. _____

TO: Colorado Civil Rights Division
6th Floor, State Services Building
1525 Sherman Street
Denver, Colorado 80203

SUBJECT: CHARGE TRANSMITTAL Suanne L. Leerssen *(Charging Party)* V. Commercial Office Product Company *(Respondent)*

Transmitted herewith is a charge of employment discrimination initially received by the:

☒ EEOC ☐ _____ on _____
(Name of 706 Agency) *(Date of Receipt)*

☒ Pursuant to the work-sharing agreement, this charge is to be initially processed by the EEOC.

☐ Pursuant to the work-sharing agreement, this charge is to be initially processed by the 706 Agency.

☐ The work-sharing agreement does not determine which agency is to initially process the charge.

☐ EEOC requests a waiver ☐ 706 Agency waives

☐ No waiver requested ☐ 706 Agency will process the charge initially

Please complete the bottom portion of this form to acknowledge receipt of the charge and, where appropriate, to indicate whether the 706 Agency will initially process the charge.

TYPED NAME OF EEOC OR 706 AGENCY DIRECTOR	SIGNATURE
WALDEN SILVA	

_____ V. _____
(Charging Party) *(Respondent)*

To whom it may concern:

☐ This will acknowledge receipt of the referenced charge and indicate this Agency's intention to initially process the charge.

☐ This will acknowledge receipt of the referenced charge and indicate this Agency's intention not to initially process the charge.

☐ This will acknowledge receipt of the referenced charge and indicate this Agency's intention to dismiss/close/not docket the charge for the following reason: _____

_____

TYPED NAME OF EEOC OR 706 AGENCY DIRECTOR	SIGNATURE

TO: Equal Employment Opportunity Commission
Denver District Office
1845 Sherman Street, 2nd Floor
Denver, Colorado 80203

DATE _____

EEOC CHARGE NO. 081841964

EQUAL EMPLOYMENT OPPORTUNITY COMMISSION

DATE March 30, 1984

EEOC CHARGE NO. 081841964

706 AGENCY CHARGE NO. _____

TO: Colorado Civil Rights Division
6th Floor, State Services Building
1525 Sherman Street
Denver, Colorado 80203

SUBJECT: CHARGE TRANSMITTAL Suanne L. Leerssen *(Charging Party)* *V.* Commercial Office Products Company *(Respondent)*

Transmitted herewith is a charge of employment discrimination initially received by the:

☐ EEOC ☐ _____ *(Name of 706 Agency)* on _____ *(Date of Receipt)*

☒ Pursuant to the work-sharing agreement, this charge is to be initially processed by the EEOC.

☐ Pursuant to the work-sharing agreement, this charge is to be initially processed by the 706 Agency.

☐ The work-sharing agreement does not determine which agency is to initially process the charge.

☐ EEOC requests a waiver ☐ 706 Agency waives

☐ No waiver requested ☐ 706 Agency will process the charge initially

Please complete the bottom portion of this form to acknowledge receipt of the charge and, where appropriate, to indicate whether the 706 Agency will initially process the charge.

TYPED NAME OF EEOC OR 706 AGENCY DIRECTOR	SIGNATURE
WALDEN SILVA	W. Silva

_____ *(Charging Party)* *V.* _____ *(Respondent)*

To whom it may concern:

☐ This will acknowledge receipt of the referenced charge and indicate this Agency's intention to initially process the charge.

☒ This will acknowledge receipt of the referenced charge and indicate this Agency's intention not to initially process the charge.

☐ This will acknowledge receipt of the referenced charge and indicate this Agency's intention to dismiss/close/not docket the charge for the following reason: _____

_____

TYPED NAME OF EEOC OR 706 AGENCY DIRECTOR	SIGNATURE
Dorothy J. Porter, Ph.D.	Pamela J. Pearson

TO: Equal Employment Opportunity Commission
Denver District Office
1845 Sherman Street, 2nd Floor
Denver, Colorado 80203

DATE 4/04/84

EEOC CHARGE NO. 081841964

706 AGENCY CHARGE NO. D84OR998

APPENDIX I

STATE OF COLORADO
Department of Regulatory Agencies
Wellington E. Webb
Executive Director

Richard D. Lamm
Governor

CIVIL RIGHTS DIVISION
Dorothy J. Porter, Ph.D., Director

April 4, 1984

Ms. Suanne L. Leerseen
17491 E. Union Dr.
Aurora, CO 80013

RE: Charge No. D84DR998, Leerseen vs. Commercial Office Products Co.

Dear Ms. Leerseen:

You recently filed a charge of employment discrimination with the Equal Employment Opportunity Commission. That agency has sent us a copy of your charge and we have assigned it the above number.

To avoid duplication of effort, the Civil Rights Division will take no action on your charge until the Equal Employment Opportunity Commission terminates its proceedings. The final findings and orders of the Equal Employment Opportunity Commission may be adopted by the Civil Rights Division with no further action taken by our Agency. You are encouraged to cooperate with the Equal Employment Opportunity Commission and contact them if you have any questions regarding the investigation of your charge.

You are advised that Colorado law requires that final action must be taken by the Colorado Civil Rights Commission within 180 days of the filing of your charge unless you request an extension of time. You may request up to a 90 day extension. If you fail to request an extension, the Commission will lose jurisdiction on the 181st day and you may pursue the matter in District Court.

If you move or change your phone number, please keep us informed of these changes. Your cooperation in this matter is essential.

Sincerely,

/s/ PAM PEARSON

Case Control

cc: Respondent, file copy

APPENDIX J

UNITED STATES OF AMERICA
EQUAL EMPLOYMENT OPPORTUNITY
COMMISSION

SUBPOENA

TO: Robert G. Tomlinson, President, Commercial Office Products Co., 13800 East 39th Avenue, Aurora, CO 80011

NO. DE-84-09

IN THE MATTER OF SUANNE L. LEERSSEN

v.

COMMERCIAL OFFICE PRODUCTS COMPANY
CHARGE NO. 081841964

Having failed to comply with previous request(s) made by or on behalf of the undersigned Commission official, YOU ARE HEREBY REQUIRED AND DIRECTED TO:

☐ *Testify before:*

☒ *Produce and bring the documents described below:*

☒ *Provide access to the evidence described below for the purpose of examination or copying to:*

Andrew G. Williams of the Equal Employment Opportunity Commission at 1531 Stout Street, 6th Floor on 09/28/84 at 10 a.m. o'clock of that day.

The evidence required is:

1. All documents in Charging Party's Personnel file.

2. Documents which show the name, sex, title, and date of hire of the person who replaced the Charging Party.

3. Documents which show the rules governing employee's duties and conduct in effect June 10, 1983.

4. Documents which show Charging Party received or was aware of Respondent's rules governing duties and conduct.

5. Documents in effect on June 10, 1983 which describe policies governing disability leave (including maternity leave) as it applies to application for leave, eligibility, length of leave, confirmation by physician, and return to employment after the leave.

6. A position description for the position held by the Charging Party. Include any documentation that describes the qualifications for the position held by the Charging Party.

7. All documents in effect on June 10, 1983, that describe the benefits provided for pregnancy related disabilities including medical insurance, disability pay, sick leave, maternity leave and leave of absence.

8. Documents that were in effect on June 10, 1983, that describe in detail the company's policy for extended disability leave of absences for illness or injury other than pregnancy related leave of absence.

9. Documents that identify by name, sex, position prior to leave, dates of leave, reasons for leave, date of approval or if disapproved, reasons therefore, and position upon return from leave for all employees who requested disability leave of absences (including pregnancy related) during the period June 1, 1981, through July 1, 1983.

10. Documents that identify by name, sex, title, date of hire, date of discharge and reason(s) for

discharge for all employees discharged during the period June 1, 1983, through July 1, 1984.

11. The company's written policies governing discharge and discipline in effect June 10, 1983.

12. The company's medical insurance policy(s) for employees in effect June 10, 1983.

In lieu of providing copies of the documents requested in paragraphs 1 through 12 above, provide access to the Commission, for the purpose of review and reproduction of the documents requested.

ON BEHALF OF THE COMMISSION

/s/ WALDEN SILVA

9-20-84

ISSUING OFFICIAL

Walden Silva, District Director
Equal Employment Opportunity Comm.
1531 Stout Street, 6th Floor
Denver, CO 80202

APPENDIX K

IN THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLORADO

Civil Action No. 85-K-1385

EQUAL EMPLOYMENT OPPORTUNITY COMMISSION, PETITIONER,

v.

COMMERCIAL OFFICE PRODUCTS COMPANY, RESPONDENT.

[MAY 21, 1985]

PETITION FOR AN ORDER ENFORCING ADMINISTRATIVE SUBPOENA

COMES NOW, the Petitioner, Equal Employment Opportunity Commission, by and through it's attorneys, and Petitions this Court for an Order Enforcing Administrative Subpoena No. DE-84-09, and as grounds Petitioner states as follows:

1. This is a civil action for enforcement of an Administrative Subpoena pursuant to Section 710 of Title VII of the Civil Rights Act of 1964, as amended, 42 U.S.C. § 2000e-5(f) and § 2000e-9.

2. Jurisdiction is conferred upon this Court by Sections 706(f)(3) and 710 of Title VII, 42 U.S.C. § 2000e-5 (f) and § 2000e-9.

3. Petitioner is the United States Equal Employment Opportunity Commission, the Federal Agency charged with enforcing the Civil Rights Act of 1964, as amended, including, *inter alia*, the investigation of charges of unlawful employment practices.

4. Respondent, Commercial Office Products, (hereinafter "Employer") has continuously been and is now a Colorado Corporation, authorized to do business in the City of Denver, State of Colorado, where it is engaged in the sale of office supplies to persons and businesses between and among the various states. The Employer has continuously and does not employ more than fifteen (15) persons.

5. Since approximately March 26, 1982, the Employer has continuously been and is now an employer engaged in an industry affecting commerce within the meaning of Section 701(b), (g) and (h) of Title VII, 42 U.S.C. § 2000e(b), (g) and (h), by obtaining and selling office supplies among the various states.

6. On March 26, 1984, the Commission commenced an investigation of the Employer in accordance with a charge filed on March 26, 1984, by Ms. Suanne L. Leerssen whose charge alleged she was discharged by the Employer because of her status (Pregnant) and sex (Female).

7. On September 20, 1984, after repeated unsuccessful, attempts to secure the information from the Employer, which was essential to the investigation of the Leerssen charge, the EEOC issued Administrative Subpoena No. DE-84-09. The Employer declined to answer the Subpoena and questionnaire attached to the Subpoena. The information and documents requested in the Subpoena and questionnaire are relevant to the investigation of the Leerssen charge. The Subpoena was addressed to Robert G. Tomlinson, President, Commercial Office Products and directed him to appear before Andrew G. Williams, an Equal Opportunity Specialist for the EEOC, at Petitioner's place of business on September 28, 1984. On September 26, 1984, a Petition to Revoke or Modify

Subpoena was sent by the Employer to the EEOC's Denver District Office.

8. On October 5, 1984, Mr. Walden Silva, Director of the Denver District Office of the EEOC, issued a Determination denying the Employer's Petition to Revoke or Modify Subpoena.

9. On October 15, 1984, the Employer then submitted an appeal of Mr. Silva's decision to the EEOC's Office of General Counsel entitled Petition to Revoke or Modify Subpoena. The appeal was made pursuant to 29 C.F.R. 1601.16(3)(b).

10. On March 18, 1985, the EEOC's Office of General Counsel issued it's Determination denying the Employer's appeal.

11. Following the denial of the Employer's appeal, the EEOC's Denver District Office again made attempts to obtain documents and information essential to the EEOC investigation. However, in a letter dated April 11, 1985, the Employer again reiterated that the EEOC is without jurisdiction and that it will not comply with Administrative Subpoena No. DE-84-09. Since March 26, 1984, the Employer has failed and continues to refuse to comply with said Subpoena, to date the Employer has still not complied with the terms of said Subpoena.

12. Documents and information sought from the Employer are not currently in the possession of the Commission, and have never been in the Commission's possession at any time. The documents and information sought are relevant and essential to the Commission's investigation of the Leerssen charge.

WHEREFORE, the Equal Employment Opportunity Commission prays:

a. That this Court enter an Order directing the Employer to obey the forementioned Subpoena in

each and every requirement thereof and order the Employer to produce the documents and other information as required and called for by the Administrative Subpoena No. DE-84-09 before Andrew G. Williams or any office of the Commission at such time and place as may be set by the Court.

b. That the Equal Employment Opportunity Commission be granted such relief as may be deemed necessary and proper including costs of pursuing this Subpoena Enforcement.

RESPECTFULLY SUBMITTED,

JOHNNY J. BUTLER
GENERAL COUNSEL (ACTING)

PHILLIP B. SKLOVER
ASSOCIATE GENERAL COUNSEL

EQUAL EMPLOYMENT
OPPORTUNITY COMMISSION
2401 E Street, N.W.
Washington, D.C. 20506

RALPH G. TORRES
REGIONAL ATTORNEY (ACTING)

/s/ ROBERT O. ROMERO
ROBERT O. ROMERO
SUPERVISORY TRIAL ATTORNEY
(ACTING)
ATTORNEY #6126

/s/ RONALD W. TAOKA
RONALD W. TAOKA
TRIAL ATTORNEY
ATTORNEY #7725

EQUAL EMPLOYMENT
OPPORTUNITY COMMISSION
DENVER DISTRICT OFFICE
1531 Stout Street, 6th Floor
Denver, Colorado 80202
(303) 844-2778

APPENDIX L

EQUAL EMPLOYMENT OPPORTUNITY
COMMISSION
DENVER DISTRICT OFFICE
Rio Grande Building – 6th Floor
1531 Stout Street
Denver, Colorado 80202
303/837-2771

CHARGE NO. 081841964

U.S. EQUAL EMPLOYMENT OPPORTUNITY COMMISSION, AND SUANNE L. LEERSEEN, CHARGING PARTY

v.

COMMERCIAL OFFICE PRODUCTS CO.
RESPONDENT

DETERMINATION ON PETITION TO REVOKE OR MODIFY SUBPOENA

As per 29 C.F.R. 1601.16(b), this is my formal response to your Petition to Revoke or Modify Subpoena regarding the above referenced case which was received by the Denver District Office on September 27,1984. Your Petition was timely filed with this Office.

FACTS

The Charging Party, Leerseen, was discharged from her position of purchasing agent by Respondent on June 10, 1983. She filed a charge of discrimination with the EEOC on March 26, 1984, which was 289 days after the alleged violation. On March 26, 1984, the Colorado Civil Rights Division, pursuant to the work-sharing agreement between

the EEOC and the Colorado Civil Rights Divison, orally waived jurisdiction over this charge. On March 30, 1984, CCRD in a form 212 verified this oral waiver in writing.

Respondent-Petitioner having been served with a subpoena issued by me pursuant to Section 710 of the Civil Rights Act of 1964, as amended, on September 20, 1984, has filed a Petition to Revoke or Modify Subpoena. I have reviewed the Petition pursuant to the Commission's Regulations, 29 C.F.R. 1601.16(b), and I, hereby, deny the Petition to Revoke or Modify Subpoena.

Respondent has refused to provide the requested information sought by the Commission to investigate this charge. It's position is that the Commission lacks jurisdiction because the charge was untimely filed. Respondent asserts that the Commission is without jurisdiction in this matter, and therefore, lacks authority to issue a subpoena under 29 C.F.R. 1601.16 of the Commission's Procedural Regulations.

TIMELY FILING UNDER STATE LAW

Respondent's first argument is that for the Charging Party to receive the benefit of the extended 300-day period for filing a charge of discrimination with the EEOC that it must comply with Colorado statute, C.R.S. § 24-34-403. This statute requires that a person must file a charge of discrimination with six months from the date the alleged discrimination took place.

Smith v. Oral Roberts Evangelistic Ass'n, Inc., 731 F.2d 684 (10th Cir. 1984), clearly states on page 687 that "Nothing in Title VII requires filing with the state or local agency (or the EEOC) within the time periods commanded by state law." It further states, at 688, "Specifically, there is no requirement that in order to 'commence' state proceedings and thus preserve federal rights, the complainant must comply with state dictated time periods."

Respondent's argument, that because Ms. Leerseen did not file a charge of discrimination with either the state of Colorado or the EEOC until well after Colorado's six month state statute of limitations had expired, the Charging Party cannot take advantage of the extended 300-day federal filing period, is rejected based on the 10th Circuit case of *Smith v. Oral Roberts Evangelistic Ass'n, Inc.*, cited above.

THE DEFERRAL REQUIREMENTS OF § 706(c) HAVE NOT BEEN MET

Respondent's second argument is essentially that the state 706 agency, CCRD, when it waived jurisdiction to the EEOC had not completed its consideration of the charge prior to the end of the 300 day period. Respondent to support it's position quotes portions of the CCRD-D-2 form letter sent to Ms. Leerseen by CCRD which states in pertinent part that, "To avoid duplication of effort, the Civil Rights Division will take no action on your charge until the Equal Employment Opportunity Commission terminates its proceedings." Further Respondent cites the New York U.S. District Court case of *Klausner v. Southern Oil Company of New York, Inc.*, 533 F.Supp. 1335 (N.D.NY 1982), which interpreted whether the waiver by the state 706 agency constituted a termination of the state proceedings within the meaning of 42 U.S.C. § 2000e-5(c) and, thus, would make the filing of Charging Party's charge with the EEOC timely.

Respondent's second argument is denied for the following reasons:

(1) Since the Leerseen charge was filed with the EEOC on the 289th day following the alleged act of discrimination, CCRD, on the date of filing, would not have jurisdiction to process the charge under relevant state discrimination statutes. Colorado's statute of limitations for filing discrimination complaints is six months from the alleged act of discrimination.

(2) CCRD could not have jurisdiction over Ms. Leerseen's Title VII charge since that is the sole province of the EEOC.

(3) After an investigation of a Title VII case by the EEOC is completed, the work-sharing agreement between the EEOC and CCRD does not provide for EEOC's findings to be the subject of substantial weight by CCRD.

(4) The appropriate New York statute of limitation for filing a discrimination complaint provides a complainant with one year in which to file a complaint from the date of alleged discriminatory act not six months as in Colorado. New York's 706 agency could still have jurisdiction of the charge filed in *Klausner* even after the EEOC completed it's processing of the charge since it's statute of limitation was one year and the EEOC completed processing the charge in approximately eleven months from the date of the alleged act of discrimination. Thus, the New York 706 agency still had jurisdiction over the charge in *Klausner* via it's state discrimination statutes and it could still review the findings made by the EEOC.

(5) In Colorado, unlike New York, the state when it waives jurisdiction of a charge filed after 240 days completely terminates any action on the charge since it has no jurisdiction over either Title VII or employment discrimination under state statutes.

(6) The confusion concerning CCRD's ability to further process the Ms. Leerseen's charge came about because of the form letter sent to the

Charging Party by CCRD. It is EEOC's position that when CCRD waived jurisdiction to the EEOC it's involvement with Ms. Leerseen's charge was terminated within the meaning of 42 U.S.C. § 2000e-5(c). If CCRD did not completely close the case it was kept open merely for record keeping purposes and not to take any further action on Ms. Leerseen's charge.

CONCLUSION

The charge filed by Ms. Leerseen is timely pursuant to relevant statutes and case law. Thus, the EEOC has jurisdiction over the charge filed by Ms. Leerseen and the right to subpoena documents pursuant to its investigation of her charge. Based on the foregoing, Respondent's Petition to Revoke or Modify Subpoena is denied.

If Respondent disagrees with this Determination, it can appeal this Determination pursuant to 29 C.F.R. 1601.16(b).

On Behalf of the Commission:

October 5, 1984 /s/ WALDEN SILVA
DATE Walden Silva, *District Director*

To: Mr. James L. Stone
Fairfield & Woods
1600 Colorado National Bldg.
950 Seventeenth Street
Denver, CO 80202

Certified No. P 553 018 468
Return Receipt Requested

APPENDIX M

UNITED STATES EQUAL EMPLOYMENT OPPORTUNITY COMMISSION
Washington, D.C. 20507

Charge No. 081-84-8964
Subpoena N. DE-84-09

IN THE MATTER OF:

SUSANNE L. LEERSEEN, CHARGING PARTY,

v.

COMMERCIAL OFFICE PRODUCTS CO.,
RESPONDENT.

ADDRESSEES:

Robert G. Tomlinson, Pres.
Commercial Office Products Co.
13800 East 39th Avenue
Auroro, Colorado 80011

Brent T. Johnstone, Esq.
Fairfield and Woods
950 17th Street
1600 Colorado National Bldg.
Denver, Colorado 80802

DETERMINATION ON APPEAL PETITION

Respondent-Appellant (Respondent) has timely filed an Appeal from a Determination of the District Director of the Denver District Office denying Respondent's Petition

to Revoke Subpoena. The requisite number of Commissioners having reviewed the Appeal Petition pursuant to the Commission's Procedural Regulations, 29 C.F.R. 1601.16(b), the Commission hereby denies the Appeal Petition for the reasons stated below.

BACKGROUND

The underlying charge alleges that Charging Party was discharged because she was pregnant. The charge was filed with the Commission 289 days after the alleged discriminatory act. Although the charge was untimely under the state statute, the Colorado Civil Rights Division orally waived jurisdiction over the charge on the same day that the Commission received it pursuant to the work sharing agreement.

Respondent maintains that because the charge was not timely under the state statute of limitations the Charging Party should not receive the benefit of the extended 300-day period for filing a charge with the Commission.

CONCLUSION

We agree with the Determination of the District Director on the Petition to Revoke or Modify the Subpoena and hereby adopt it in its entirety.

DETERMINATION

Respondent's Appeal Petition is denied. The addressee of the subpoena is directed to appear before *Mr. Andrew Williams* of the U.S. Equal Employment Commission at 1531 Stout Street, 6th Floor, Denver, Colorado on April 11, 1985, at 10:00 o'clock A.M. of that day and at said time and place produce all documents described in the subpoena.

ON BEHALF OF THE COMMISSION

3/18/85
Date

/s/ JOHNNY J. BUTLER
Johnny J. Butler
General Counsel (Acting)

APPENDIX N

EQUAL EMPLOYMENT OPPORTUNITY COMMISSION
DENVER DISTRICT OFFICE
Rio Grande Building – 6th Floor
1531 Stout Street
Denver, Colorado 80202
303/837-2771

WORKSHARING AGREEMENT

BETWEEN

COLORADO CIVIL RIGHTS COMMISSION

AND

THE U.S. EQUAL EMPLOYMENT OPPORTUNITY COMMISSION

Inasmuch as it has been agreed between the Colorado Civil Rights Commission, Division, (hereinafter referred to as CCRC) and the Denver District Office of the Equal Employment Opportunity Commission, that it is desirable to effect procedures to minimize duplication of effort in the handling of deferred charges, and to achieve maximum consistency of purpose and results, the following is hereby agreed:

1. When a charge is filed with CCRC and CCRC has reason to believe it involves a matter within the jurisdiction of EEOC, CCRC will inform Charging Party of his/her Title VII, ADEA and EPA rights, including the fact that the charge will be forwarded to EEOC for appropriate action. When a charge is filed with EEOC and EEOC has reason to believe it involves a matter

within the jurisdiction of the CCRC, EEOC will inform Charging Party of his/her rights and will also inform him/her of the time limitations required by that statute.

2. EEOC by the agreement designates and establishes the CCRC as an agent of EEOC for the purposes of receiving charges on behalf of EEOC and CCRC agrees to receive such charges. All charges received by CCRC which meet its jurisdictional requirements and those of Title VII, as amended, will be forwarded to EEOC within 48 hours. Charges which do not meet CCRC's jurisdictional requirements, but may meet those of Title VII, as amended, ADEA and/or EPA, will be received as well and forwarded to EEOC.
3. CCRC, by this Agreement, and in accordance with Rule 10.4(E) of its Rules of Practice and Procedure designates the EEOC Denver District Office(s) as an agent of the Commission for purposes of receiving charges of employment discrimination and the EEOC agrees to accept such charges on a form mutually agreed upon by the EEOC and the CCRC, and to ensure that all applicable provisions of the above-cited Rule 10.4 are met.
4. Charges which do not meet EEOC's jurisdictional requirements, but may meet those of C.R.S. 1973, 24-34-401, as re-enacted, will be received as well and forwarded to the CCRC. CCRC agrees to waive exclusive rights to process all charges found nonjurisdictional with EEOC in order that dismissal may occur prior to the 61st day. Moreover, EEOC will endeavor to determine such jurisdictional questions and to notify the CCRC within 2 weeks of the filing of

a charge whenever EEOC lacks jurisdiction for any reason so that the CCRC can take immediate action on such charges and effectively protect the rights of the charging party(ies). In addition to notifying the CCRC of EEOC's lack of jurisdiction for any reason so that the CCRC can take immediate action on such charges and effectively protect the rights of the charging party(ies). In addition to notifying the CCRC of EEOC's lack of jurisdiction, the EEOC will also provide to the CCRC all available intake documents in order to further assist the expedited resolution of the charge.

5. The EEOC District Office will send to the CCRC by certified/return receipt requested mail a copy of each charge and supporting documents it receives which will be deferred to CCRC under Section 706 of the Act. For those charges EEOC receives in person, EEOC will take the charge on a form mutually agreed upon by the EEOC and CCRC. The CCRC will review upon receipt all charges so deferred. All charges on which advance agreement has been reached pursuant to paragraph 9 below will not be acted upon by CCRC until EEOC has resolved the charge. CCRC will review EEOC's resolution, in accordance with CCRC's Statute, rules and regulations.
6. It is the intent of the parties, to the extent possible, to use uniform forms and case handling procedures. Charges and closure documents exchanged between EEOC and the CCRC will contain the EEOC charge number and the CCRC charge number.
7. It is the objective of both parties to avoid duplication of investigation and settlement ef-

fort wherever possible. In order to achieve this objective, the EEOC and CCRC agree to implement the work sharing provisions of paragraphs 8 and 9 below.

The CCRC will take primary responsibility for processing all charges originally received by CCRC except as provided for in paragraph 9, and it will process the following charges:

a. all charges filed by a CCRC Agency Commissioner, -
b. all charges alleging two or more basis [*sic*], at least one of which EEOC has no jurisdiction to process under Title VII, and which is jurisdiction [*sic*] under the CCRC law,
c. all charges filed by a specific charging party, against a respondent, in which the CCRC processed a prior charge by said charging party against the same respondent.

9. EEOC will take primary responsibility for processing all charges remaining except as provided in paragraph 8 and in addition will process the following charges:
   a. charges filed by an EEOC Commissioner,
   b. charges where the full Title VII relief for charging party would not include monetary damages,
   c. all charges against respondents who are designated and agreed for initial processing by the EEOC in a supplementary memorandum to this Worksharing Agreement.
   d. all charges which are concurrently filed under the Equal Pay Act and Title VII and all charges which are concurrently filed under the ADEA and Title VII.

   e. all charges designated by EEOC as ELI. (Early Litigation Investigation)

10. In order to avoid delay as to all charges other than those enumerated in paragraph 8 above, CCRC hereby waives its exclusive right to process those charges for 60 days, as provided in Section 706(c) of Title VII of the Civil Rights Act of 1964, as amended, so that EEOC can take immediate action on such charges and effectively implement the work sharing provisions of paragraph 9 above.
11. Where either party has obtained a conciliation agreement, or consent decree, or where either party is administering a legal order pertaining to a respondent, the party will, wherever possible, take primary responsibility for charges which are affected by such agreements or orders.

    Any exception to work sharing provisions delineated in paragraphs 8 and 9 above where either party expressed an interest in pursuing a charge over which it does not have primary responsibility for processing, the other party will, wherever possible, refrain from assuming primary responsibility for processing the charge. The party wishing the exception will notify the other party immediately.
12. Where either the EEOC or the CCRC has a charge in active investigation or conciliation and a charge alleging a violation of Section 704(a) is received from the same Charging Party against the Respondent, that charge of retaliation will be incorporated into the original charge and will be processed by the agency that, per the worksharing agreement, is handling the original charge.

13. The EEOC District Office will send to CCRC by certified/return receipt requested mail within 48 hours a copy of each charge and supporting document it receives which will be deferred to CCRC under Section 706 of the Act.

    For those charges received by EEOC through the mail EEOC will endeavor, where necessary, to perfect the complaint under the standards set forth in 1601.12(a) of EEOC's Procedural Regulations and in Rule 10.4 prior to deferral.

14. The CCRC will inform the EEOC of all actions taken on dual filings and charges deferred to CCRC and will provide copies of written findings, agreements, final orders, and other final actions at such time as the charging party's appeal rights have been exhausted. When requested, CCRC will also provide to the EEOC copies of all evidence upon which such actions are based.

15. Upon request, EEOC will make available to CCRC copies of its determinations, agreements, and outcome of litigation review, and any other relevant information not prohibited by law, regulation or interfederal agency agreement. EEOC will make available to CCRC copies of evidence upon which determinations are based.

    In the course of its investigation of a charge, the EEOC shall have access to relevant information in the possession of the CCRC, pursuant to C.R.S. 1973, 24-34-306(3), as reenacted, including its investigative files with respect to the same or related charges, and for this purpose representatives of the EEOC will be permitted to copy or obtain copies of pertinent documents and to utilize the same in proceedings under

Title VII. The EEOC shall in like circumstances grant to representatives of the CCRC similar access to relevant information in its possession. CCRC agrees to comply with the confidentiality provisions of Title VII of the Civil Rights Act of 1964, as amended, 42 U.S.C. 2000e et. seq. and the confidentiality provisions of the Privacy Act of 1974, 5 U.S.C. 552(a).

Furthermore, the EEOC and the CCRC agree that information, including information on conlation attempts, will not be made public where such disclosure would be contrary to Federal or State statutory provisions or policies applicable to conciliation proceedings. Sharing of any such information, including information on conciliation by the CCRC and the EEOC with each other, shall not be deemed to be making such information public pursuant to C.R.S. 1973, 24-34-306(3).

16. CCRC will designate one person in addition to its Executive Director to be its liaison officer for the purpose of coordinating activities with EEOC. All requests for information and all questions concerning this work sharing agreement and other related matters will be handled by CCRC liaison person and the EEOC Deferral Coordinator or designee.

17. Both parties agree to provide each other with all resources and research data available and permitted by law, that will assist in the processing of deferred charges.

    Additionally, both will provide training to designated staff in order to assure that the purposes of this Agreement are effectuated. This

training will include participation in training sessions arranged by EEOC for its own staff and for CCRC staff.

18. EEOC and CCRC agree that this agreement supersedes all other Memoranda of Understanding and Agreements entered into by the two agencies.
19. In addition to the division of responsibility for charge processing in paragraph 8, CCRC will take primary responsibility for processing all charges, with the exception of those noted in paragraph 9, originating outside of a 100 mile radius of Denver.
20. This agreement shall operate from the effective date of the fully executed agreement and until such time as terminated by the mutual consent of the parties. It may, however, be renegotiated and/or renewed by mutual consent of the parties at any time.

/s/ WALDEN SILVA — 9-23-82

Walden Silva, *Director*
Equal Employment
Opportunity Commission
Denver District Office

Date

Dorothy J. Porter, Ph.D.,
Director
Colorado Civil Rights
Division

Date

ADDENDUM TO WORKSHARING AGREEMENTS CONCERNING CHARGES OF EMPLOYMENT DISCRIMINATION REFERRED FROM OTHER FEDERAL AGENCIES FILED AGAINST RECIPIENTS OF FEDERAL FINANCIAL ASSISTANCE

The attached addendum to worksharing agreements concerning complaints of employment discrimination referred to EEOC under 28 C.F.R. Part 42 and 29 C.F.R. Part 1691 (copy attached) provides for a waiver of exclusive initial processing rights by 706 agencies for those complaints which EEOC receives from other Federal agencies and processes. The regulation cited requires Federal agencies that grant financial assistance or revenue sharing funds to send to EEOC for processing complaints of employment discrimination covered by Title VI of the Civil Rights Act, Title IX of the Education Amendments of 1972 and similar statutes if the complaints allege employment discrimination which is subject to Title VII or the Equal Pay Act. Such complaints are defined as "joint complaints" and EEOC acting under its own authority and the delegated authority of the referring agency will conduct an investigation of the allegations of employment discrimination and attempt to resolve the complaint.

Only those complaints which allege employment discrimination against an individual will be referred. Pattern or practice complaints and complaints alleging discrimination in the provision of services as well as in employment will generally be retained by the other Federal agencies for investigation. The referring agency may refer those complaints to EEOC in certain circumstances. The referring agency may also in certain circumstances retain complaints against an individual for investigation but most, if not all, of the latter complaints will be sent to EEOC.

It is essential that the attached provision be added to worksharing agreements by March 28, 1983, the date the

rule on referrals becomes effective. Since under the terms of the rule the referring agency's authority to investigate complaints is delegated to EEOC only deferral of such complaints would unnecessarily delay the process.

Addendum To Worksharing Agreement

This addendum modifies the attached Worksharing Agreement as follows:

The EEOC will process all charges referred from other federal agencies against respondents who are recipients of federal financial assistance subject to: (1) Title VI of the Civil Rights Act of 1964; (2) Title IX of the Educational Amendments of 1972; (3) State and Local Fiscal Assistance Act of 1972, as amended; and (4) provisions similar to Title VI and Title IX in federal grant statutes to the extent such provisions relate to the prohibition of employment discrimination covered by Title VII and the Equal Pay Act of 1963.

Charges in process under fact-finding, investigation, and settlement procedures on or before March 28, 1983, shall not be affected by this amendment and will be processed to completion according to previously prescribed procedures.

Dorothy J. Porter, Ph.d., Director	March 31, 1983
Colorado Civil Rights Division	Date
/s/ DOROTHY J. PORTER	
Signature	Date

APPENDIX O

STATE OF COLORADO
Department of Regulatory Agencies
Wellington E. Webb
Executive Director

Richard D. Lamm
Governor

CIVIL RIGHTS DIVISION
Dorothy J. Porter, Ph.D., Director

June 14, 1984

Ms. Suanne L. Leerssen
17491 E. Union Drive
Aurora, CO 80013

RE: EEOC Charge No. 081831963–CCRD Charge No. D84DR998–*Leerssen vs. Commercial Office Products Company*

Dear Ms. Leerssen:

Recently the Colorado Civil Rights Commission learned that an administrative error was made on your case when it was untimely deferred by the EEOC and was assigned a charge number (D84DR998) and a Form CCRD-D-2 was sent to you. Your case, which was deferred by the Equal Employment Opportunity Commission, should not have been processed by the CCRD.

Your charge, when received by the CCRD, was untimely under Colorado Revised Statutes 24-34-403, which allows

a six month jurisdictional time limit. Therefore you are advised that the CCRD at no time had jurisdiction over your deferred charge.

Sincerely yours,

/s/ DOROTHY J. PORTER PH.D.
Dorothy J. Porter, Ph.D., Director
Colorado Civil Rights Division

DJP:drs

c: Commercial Office Products Company
Case File

U.S. GOVERNMENT PRINTING OFFICE: 1987— 181 483/40277

OPPOSITION

BRIEF

No. 86-1696

IN THE

Supreme Court of the United States

OCTOBER TERM, 1986

EQUAL EMPLOYMENT OPPORTUNITY COMMISSION,
Petitioner,

v.

COMMERCIAL OFFICE PRODUCTS COMPANY,
Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals For the Tenth Circuit

RESPONDENT'S BRIEF IN OPPOSITION

JAMES L. STONE
Counsel of Record

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1700 Lincoln Street, #2400
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(303) 830-2400

Attorneys for Respondent.

PRESS OF BYRON S. ADAMS, WASHINGTON, D.C. (202) 347-8203

QUESTION PRESENTED

Whether the District Court and Court of Appeals correctly determined that the state deferral agency did not terminate its proceedings for purposes of Section 706(c) of Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e-5(c), where the state agency maintained the discrimination charge in its files, assigned the charge a state number and advised the charging party that:

(a) the state agency would take no action on the charge until after the Equal Employment Opportunity Commission ("EEOC") terminated its proceedings;

(b) the state agency might adopt the final findings and order of the EEOC;

(c) final action on the charge must be taken by the state agency within 180 days of the filing of the charge;

(d) an extension of time up to 90 days may be requested to preserve the state agency's jurisdiction; and

(e) it was essential to cooperate with the state agency in this matter and to keep the state agency informed of any change in address or phone number.

TABLE OF CONTENTS

TABLE OF AUTHORITIES

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Petitioner,

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COMMERCIAL OFFICE PRODUCTS COMPANY,
Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals For the Tenth Circuit

---

RESPONDENT'S BRIEF IN OPPOSITION

The Respondent, Commercial Office Products Company[1], respectfully requests that this Court deny the Petition for a Writ of Certiorari seeking review of the Tenth Circuit's decision in this case.

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[1] Commercial Office Products Company is a corporation which now has the following parent, subsidiary, and/or affiliate companies: N.B.I. Systems, Inc.; Integrated Solutions, Inc.; N.B.I. France, Inc.; N.B.I. International, Inc.; N.B.I. Virgin Islands, Inc.; Peninsula Office Supply, Inc.; N.B.I. Office Supplies of Washington, Inc.; Yukon Paper Distributors, Inc.; Yukon Office Supply of Washington, Inc.; Yukon Office Supply of Hawaii, Inc.; Yukon Office Supply, Inc.; and N.B.I.'s The Office Place, Inc.

STATEMENT OF THE CASE

This case concerns the efforts by Petitioner, Equal Employment Opportunity Commission ("EEOC"), to enforce a subpoena which it issued to Respondent, Commercial Office Products Company ("Commercial") in connection with a charge of discrimination filed by Suanne L. Leerssen under Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e, *et. seq.* ("Title VII").

On March 26, 1984, Ms. Leerssen submitted a charge of discrimination to the EEOC, alleging that on June 10, 1983, 290 days earlier, Commercial discharged her because of her sex. The discharge occurred in Colorado, and Colorado has laws prohibiting employers from discharging employees because of their sex and establishing a state fair employment practices agency, the Colorado Civil Rights Division ("CCRD"), with authority to grant or seek relief from any such practice.

Section 706(c) of Title VII, 42 U.S.C. § 2000e-5(c) provides that in a state with such laws, no charge may be filed with the EEOC "before the expiration of sixty days after proceedings have been commenced under the State or local law, unless such proceedings have been earlier terminated." In an effort to commence proceedings under Colorado law on Ms. Leerssen's behalf, the EEOC forwarded a copy of her charge to the CCRD on March 30, 1984, together with a Charge Transmittal (App. G to Pet. for Cert., 26a).

Rather than wait for 60 days to elapse or for the CCRD to terminate its proceedings, however, the EEOC commenced its investigation of Ms. Leerssen's charge on the same day it received the charge, March

26, 1984 (see paragraph 6 of App. K to Pet. for Cert., 34a). Further, the EEOC instructed the CCRD in the Charge Transmittal form that the EEOC intended to initially process the charge (App. G to Pet. for Cert., 26a). The EEOC began immediately to investigate the charge, notwithstanding the provisions of Section 706(c), apparently because of the provisions of a worksharing agreement previously entered into between the EEOC and the CCRD (App. N to Pet. for Cert., 45a). Paragraphs 8 and 9 of the worksharing agreement essentially provide, with some exceptions, that the EEOC will process charges initially submitted to the EEOC, and the CCRD will process charges initially submitted to the CCRD.

On April 4, 1984, the CCRD completed the lower portion of the Charge Transmittal. The CCRD checked a box which indicated the CCRD's "intention not to initially process the charge." The CCRD did not check an alternative box which would have indicated the CCRD's "intention to dismiss/close/not docket the charge. . . ." (App. H to Pet. for Cert., 27a). There is no evidence that the CCRD ever returned this completed Charge Transmittal to the EEOC.

Also on April 4, 1984, the CCRD sent Ms. Leerssen a letter (App. I to Pet. for Cert., 28a) which informed her of the following facts:

> 1. The EEOC forwarded a copy of Ms. Leerssen's charge to the CCRD, which assigned it a CCRD charge number;
>
> 2. The CCRD would not take any action on Ms. Leerssen's charge until after the EEOC terminated its proceedings;

3. The CCRD might adopt the final findings and order of the EEOC;

4. Final action on her charge must be taken by the CCRD within 180 days of the filing of her charge;

5. Ms. Leerssen could request up to a 90 day extension of time; and

6. It was essential for Ms. Leerssen to cooperate with the CCRD concerning the charge and to keep the CCRD informed of any change in address or phone number.

Believing Ms. Leerssen's charge to be untimely, Commercial declined to answer an extensive EEOC questionnaire and then exhausted all administrative procedures for contesting the EEOC's subsequent subpoena. The EEOC then petitioned the United States District Court for the District of Colorado to enforce its subpoena. In response, Commercial primarily argued that the charge was untimely under *Mohasco Corp. v. Silver*, 447 U.S. 807 (1980) and *Klausner v. Southern Oil Co.*, 533 F. Supp. 1335 (N.D.N.Y. 1982). Commercial argued that the CCRD had not terminated its proceedings within 60 days nor before expiration of 300 days from the date of the alleged discriminatory act. This in turn meant that pursuant to Section 706(c), the charge could not have been filed with the EEOC until the 350th day (290 plus 60), which is beyond the statutory time period identified in Section 706(e) of Title VII, 42 U.S.C. § 2000e-5(e).

Judge Kane agreed with Commercial's principal argument and, ruling from the bench at a hearing held on June 6, 1985, stated simply, "I think *Klausner* is persuasive. The petition to enforce the subpoena is

denied. We'll be in recess." Judge Kane's reference to *Klausner* indicates that he found, as a factual matter, that the CCRD did not terminate its proceedings prior to the expiration of the 300-day period.

After Judge Kane's ruling of June 6, 1985, the EEOC filed a Motion to Alter or Amend Judgment, together with a letter from the CCRD to Ms. Leerssen dated June 14, 1985,[2] stating that the CCRD never had jurisdiction over her charge.[3] This letter was the very first indication by the CCRD that it had terminated its proceedings with respect to Ms. Leerssen's charge. Judge Kane denied the EEOC's motion.

On appeal to the Court of Appeals for the Tenth Circuit, Judge Kane's decision was affirmed by Judge Tacha and Judge Seth. The EEOC's petition for rehearing was denied, and its suggestion for rehearing en banc was denied by Judges Holloway, Seth, Barrett, Anderson, Tacha, and Baldock.

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[2] The letter's terms are purportedly set forth in Appendix O to the EEOC's Petition, but that document misstates its date to be June 14, *1984*, when it was really written in *1985*, well over one year after Ms. Leerssen filed her charge. The correct date is referenced in the Tenth Circuit's opinion (App. A to Pet. for Cert., 15a, n. 14).

[3] As recognized by the Tenth Circuit, the CCRD's representation in the letter presented to Judge Kane by the EEOC, that it never had jurisdiction over Ms. Leerssen's charge, is contrary to the CCRD's Rule 10.4(F)(2) of the Code of Colorado Regulations, 3 C.C.R. 708-1, which provides that the state time limits on charges bar a claim only "where the respondent objects that the charge is not timely filed." (App. A to Pet. for Cert., 15a, n. 14).

REASONS THE PETITION SHOULD BE DENIED

I. The Decision Below Merely Applies Established Supreme Court Precedent to the Specific Facts of This Case.

The decision in this case hinges primarily on the application of two sections of Title VII, Section 706(e), 42 U.S.C. § 2000e-5(e), and Section 706(c), 42 U.S.C. § 2000e-5(c). In *Mohasco Corp. v. Silver*, 447 U.S. 807 (1980), this Court provided a thorough and well-reasoned analysis of the interaction of these two sections of Title VII. The Court held that a charge which was received by the EEOC on the 291st day could not have been "filed" with the EEOC until the 351st day because of the 60-day deferral requirement of Section 706(c). (The state agency had not terminated its proceedings within the 60-day deferral period.) The Court concluded that the charge was therefore untimely under Title VII because the 300-day period provided by Section 706(e) had run. The Court provided explicit instruction as to when a charge would be deemed timely filed with the EEOC:

> a complainant in a deferral State having a fair employment practices agency over one year old need only file his charge within 240 days of the alleged discriminatory employment practice in order to insure that his federal rights will be preserved. If a complainant files later than that (but not more than 300 days after the practice complained of), his right to seek relief under Title VII will nonetheless be preserved *if the State happens to complete* its consideration of the charge prior to the end of the 300-day period. [Emphasis added]

447 U.S. 814, n.16.

Given the clear guidance of this Court as to the law, and given that Ms. Leerssen's charge was filed on the 290th day, Judge Kane had only to make a factual determination as to whether the CCRD completed its proceedings prior to the end of the 300-day period. By his reference from the bench to the *Klausner* case,[4] it is clear that Judge Kane found as a factual matter that the CCRD had not terminated its proceedings prior to the expiration of the 300-day period. The Petition for Writ of Certiorari should not be granted merely to review the District Court's application of *Mohasco* to the specific and unique facts of this case.

II. There Is No Genuine Conflict Among the Courts of Appeals.

The EEOC argues that the decision below conflicts with the First Circuit's decision in *Isaac v. Harvard University*, 769 F.2d 817 (1st Cir. 1985). Vast factual differences exist, however, between the facts of this case and the facts in *Isaac*. In both this case and *Isaac*, the Title VII charge was originally filed with the EEOC, which then submitted the charge to the state agency along with a deferral transmittal form, but the similarities end there. The transmittal form in *Isaac* offered the state agency only two choices, either to process the charge or not process the charge, and the state agency indicated on the form that it "will not process this charge per agreement [with] EEOC," thereby indicating that it had terminated its proceedings. The state agency apparently took no fur-

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[4] Judge Kane's reliance on *Klausner* is noted by the Tenth Circuit (App. A to Pet. for Cert., 3a).

ther action whatsoever until more than two years later, and then it suddenly recommenced proceedings after the EEOC had already completed its investigation.

Here, the transmittal form offered the CCRD three choices, to initially process the charge, not to initially process the charge, or to "dismiss/close/not docket" the charge. The CCRD checked the second box, waiver of initial processing, not the box which would have indicated its intention to "dismiss/close/not docket" the charge. Unlike *Isaac*, therefore, the CCRD's response on the transmittal form did not indicate that it had terminated its proceedings. Further, the CCRD sent the letter to Ms. Leerssen which conclusively established that it was retaining the charge in an open status and that it intended to take further action on the charge. There was no such indication in *Isaac* that the state agency might take further action.

Although there is discussion in *Isaac* of a waiver by the state of the right to "initially" process the charge, 769 F.2d at 827, such discussion is dictum, as the First Circuit did not have before it the worksharing agreement which applied to the case, and therefore did not know whether the worksharing agreement provided only for an "initial" waiver of processing. Further, the charge transmittal form in *Isaac* apparently said nothing of a waiver of "initial" processing.

The First Circuit in *Isaac* simply held that, under the facts of that case, the state agency had terminated its proceedings. The Court stated that it would reach this conclusion regardless of whether the words of the statute were ambiguous. *Id.*, at 820, n.4. Here, the Tenth Circuit simply held, after a thorough anal-

ysis of the facts of this case (App. A to Pet. for Cert. 13a-15a), that the CCRD had not terminated its proceedings. Because the facts of the two cases are so different, they are distinguishable, and no real conflict exists.

The EEOC also asserts a conflict between the decision below and the decision in *Dixon v. Westinghouse Electric Corp.*, 787 F.2d 943 (4th Cir. 1986). Dixon filed a charge of discrimination which fell into a category of charges to be processed by the EEOC under the worksharing agreement between the EEOC and state agency. The EEOC sent the charge and a transmittal form to the state agency, and five days later the state agency returned the transmittal form after checking a box which indicated that it would not process the charge. On the same date, the state agency informed Dixon that it had terminated its proceedings with respect to her charge. The Fourth Circuit concluded on those facts that it was never contemplated that the state agency would play a substantive role in processing the charge, that the EEOC's transmittal of the charge to the state agency was for informational purposes only, and that proceedings therefore had not been "initially instituted" with the state agency, thereby precluding application of the extended 300-day period for filing Title VII charges.

Here, completely unlike *Dixon*, the CCRD clearly indicated that it would take further action on the charge. No argument was ever raised in this case that proceedings were not "initially instituted" with the CCRD. Because the facts of this case are so different from the facts in *Dixon*, there is no conflict between the statement here that proceedings were

instituted with the state agency and the holding in *Dixon* that they were not.

III. Review By This Court Is Neither Appropriate nor Necessary.

The EEOC claims that adverse consequences will flow from the decision below.[5] It must be remembered, however, that Congress prescribed 180 days as the basic period for filing a charge. Given Congress' judgment that 180 days is adequate and fair, there clearly is no injustice in the fact that some deferral state charges filed after 240 days may be found untimely. In *Mohasco* this Court addressed the fairness argument, *Id.* at 825, and also made absolutely clear that a charging party in a deferral state wishing to be certain to protect his or her rights under Title VII must file a charge by the 240th day. *Mohasco* gave fair notice to all persons in deferral states who file charges after 240 days that the timeliness of their Title VII charges will depend upon whether the state agency thereafter chooses to terminate its proceedings prior to the expiration of 300 days.

The EEOC complains that it now has only two alternatives under the Tenth Circuit's decision. The

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[5] The EEOC's statistics (Pet. for Cert., at 13) of 2,052 Title VII charges beyond 240 days filed between October 1, 1985, and May 16, 1986, are of questionable significance. Some of those charges may have been filed in nondeferral states, with the result that they would be untimely by virtue of the 180-day filing period regardless of the Tenth Circuit's decision. Further, as to that portion of those charges which were filed in deferral states, the state agencies probably terminated proceedings before 300 days in an unknown percentage of the cases, meaning that those charges would be timely regardless of the Tenth Circuit's decision in this case.

EEOC says that either it must delay its investigation of discrimination charges, or the worksharing agreements "will have to be revised to provide that the state agency relinquishes completely its jurisdiction over certain charges." (Pet. for Cert., at 13). There is another option for charges submitted to the EEOC after 240 days, however, which the EEOC ignores; the state agencies can investigate the charges where timely under state law, even if that means that some charges will not be timely filed with the EEOC.[6] Congress, in enacting Section 706(c), certainly believed state agencies to be fully capable of addressing claims of discrimination.

It appears, therefore, that the EEOC's real goal is simply to avoid Title VII's 60-day deferral requirement where state agencies do not wish to terminate their proceedings. The EEOC's campaign to eliminate the deferral requirement is evidenced by its worksharing agreements and its regulations. Congress intended that deferral to state agencies go hand in hand with the extended 300-day filing period. Under the worksharing agreement between the EEOC and the CCRD (App. N to Pet. for Cert., 45a-54a), however, the EEOC seeks both to obtain the benefit of the 300-day deferral state filing period and in effect to eliminate the deferral requirement, even though the CCRD has not terminated its proceedings and intends

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[6] Where a particular charge is untimely under state law or the state agency for other reasons chooses not to investigate the charge, the state agency can simply terminate its proceedings immediately after the charge is filed with the state agency, allowing the EEOC then to proceed immediately. If this procedure is followed, charges submitted within 300 days will be timely filed with the EEOC under the Tenth Circuit's decision.

to take further action on the charge. The deferral requirement is effectively evaded by a sleight-of-hand, paper shuffling procedure, whereby the EEOC nominally refers the charge to the CCRD and the CCRD mechanically waives initial processing.

Further, the EEOC has stated that it commenced its investigation in this case pursuant to its regulation found at 29 C.F.R. 1601.13(a)(3). That regulation seeks to maintain the 300-day filing period but eliminate all deferral whenever it appears that a charge is untimely under state law. The regulation does so by stating that such a charge is "filed" when received by the EEOC, and will be timely if received by the 300th day. This regulation is contrary to *Mohasco*.

The EEOC's efforts to eliminate the deferral requirement from Title VII should be directed to Congress, not to this Court. The consequences of the Tenth Circuit's decision are no more serious than that the EEOC will have to comply with the law as intended by Congress and interpreted by this Court in *Mohasco*.

CONCLUSION

The Petition for a Writ of Certiorari should be denied.

Respectfully submitted,

JAMES L. STONE
Counsel of Record

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REPLY BRIEF

No. 86-1696

In the Supreme Court of the United States

OCTOBER TERM, 1986

EQUAL EMPLOYMENT OPPORTUNITY COMMISSION,
PETITIONER

v.

COMMERCIAL OFFICE PRODUCTS COMPANY

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

REPLY MEMORANDUM FOR THE PETITIONER

CHARLES FRIED
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Department of Justice
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(202) 633-2217

CHARLES A. SHANOR
General Counsel
Equal Employment Opportunity Commission
Washington, D.C. 20507

TABLE OF AUTHORITIES

In the Supreme Court of the United States

OCTOBER TERM, 1986

No. 86-1696

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v.

COMMERCIAL OFFICE PRODUCTS COMPANY

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

REPLY MEMORANDUM FOR THE PETITIONER

In this case, the court of appeals held that Section 706(c) of Title VII, 42 U.S.C. 2000e-5(c), requires that the EEOC defer processing a Title VII employment discrimination charge even when the state fair employment practice agency has agreed that the EEOC should proceed immediately. We argued in our petition that the court of appeals' construction of Section 706(c) was not required by its text or its narrow legislative purpose, and frustrated Congress's clear intent "to encourage the prompt processing of all charges of employment discrimination" (*Mohasco Corp.* v. *Silver*, 447 U.S. 807, 825 (1980) (footnote omitted)). Respondent's defense of the court of appeals' ruling and, more importantly, respondent's contention that further review is not warranted is unpersuasive.

1. Respondent claims (Br. in Opp. 6-7) that this case presents merely a factbound application of this Court's decision in *Mohasco*. The decisions of both the court of

appeals and the district court, however, turned on each court's erroneous legal ruling that a decision of a state fair employment practice agency not to process initially a charge does not constitute a "termina[tion]" of state proceedings, within the meaning of Section 706(c). Neither court disputed the uncontested fact that the Colorado Civil Rights Division declined to undertake the initial processing of the complainant's charge in this case with the expectation that the EEOC would then immediately process the charge.[1] The court of appeals' ruling that the charge in this case was untimely therefore rested not on an issue of fact, as respondent suggests, but on a threshold holding of law, which is raised by our petition.

Nor, contrary to respondent's claim (Br. in Opp. 6), does this Court's decision in *Mohasco* resolve the legal issue presented in this case. *Mohasco* concerned the distinct question whether a charge received initially by the EEOC, but subsequently forwarded to the state agency for the 60-day deferral period, could be deemed "filed" with the EEOC, within the meaning of Section 706(e), 42 U.S.C. 2000e-5(e), upon its initial receipt. In that case, this Court held that the charge was "filed" with the EEOC only upon

[1]Respondent suggests (Br. in Opp. 3) that the EEOC never received the charge transmittal form completed by the Colorado Civil Rights Division (see Pet. App. 27a). The EEOC disputed this same suggestion in the courts below. According to the EEOC, the state agency maintains that it sent the form to the EEOC, as is contemplated by Vol. 1 of the EEOC Compliance Manual, § 5.3 (1987), and additionally contacted the EEOC by telephone to transmit the state agency's waiver orally. While the district court never made a formal factual finding on the issue, the court of appeals stated that the completed form had been sent back to the EEOC and the court no doubt presumed that the completed form had been received by the EEOC. See Pet. App. 2a ("The CCRD returned the charge transmittal form to the EEOC and indicated that the CCRD waived its right to initially process the charge."). In all events, neither court based its ruling on respondent's suggestion.

completion of the 60-day deferral period or upon termination of the state proceedings, whichever occurred earlier. The Court did not address the wholly distinct issue, raised in this case, of when can a state proceeding be considered "terminated," within the meaning of Section 706(c).

As described in our petition (at 7-10) we believe that the plain import of Section 706(c) is that a charge may be deemed "filed" with the EEOC when, as in this case, a state agency declines to process a charge initially in order to allow the EEOC to process that charge immediately. Contrary to the view shared by respondent and the court of appeals below, we believe that the imposition of a requirement that the state agency "completely surrender[] its jurisdiction over a charge" (Pet. App. 9a) is not required by the statutory language of Section 706(c), is contrary to its legislative purpose, and is inconsistent with EEOC's reasonable construction of the law.

2. Respondent contends (Br. in Opp. 7-9) that there is no genuine conflict between the decision of the Tenth Circuit in this case and the decision of the First Circuit in *Isaac* v. *Harvard University*, 769 F.2d 817 (1985). Respondent's purported distinction of *Isaac*, however, is illusory.

In both this case and in *Isaac*, the legal issue was the same: whether a state agency has "terminated" its proceedings when, as in both cases, it advises the EEOC to process a charge immediately, yet retains jurisdiction over the charge to act in the future. The Tenth Circuit in this case answered the question in the negative, while the First Circuit in *Isaac* answered it in the affirmative. That the transmittal form filled out by the state agency in *Isaac* differed slightly from that filled out by the state agency in this case does not, contrary to respondent's suggestion (Br. in Opp. 7-8), explain the different results. In neither case did the state agency indicate its intention, as the Tenth Circuit would require (Pet. App. 13a n.13 (emphasis in original)), to

"completely relinquish its authority to act on the charge [initially] *or in the future*." Indeed, the state agency in *Isaac* subsequently exercised its jurisdiction, thus leaving no doubt that it had intended to retain jurisdiction during the EEOC's initial processing of the charge.[2] Respondent's characterization of the First Circuit's holding in *Isaac* therefore as "dictum" plainly lacks merit. As the Tenth Circuit itself recognized (Pet. App. 8a-9a), the rulings of the two courts of appeals irreconcilably conflict.[3]

3. Finally, respondent suggests (Br. in Opp. 10-12) that the Tenth Circuit ruling is both fair and consistent with the purposes of Title VII's deferral requirement. In particular, respondent claims (*id.* at 11) that the state agency can simply investigate the charges on its own in the first instance. Respondent, however, ignores the basic premise of this entire litigation, which is that the state agency has affirmatively stated that it does not want to process a charge initially and that it would instead like the EEOC to process

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[2]In contrast, the state agency in this case subsequently indicated that it never had jurisdiction because the charge had been filed outside the applicable state statute of limitations. See Pet. 5 n.1. Respondent correctly points out (Br. in Opp. 5 n.2) a typographical error in the appendix to the petition (Pet. App. 55a), repeated in the petition itself (Pet. 5 n.1), regarding the date of the letter sent by the Colorado Civil Rights Division. The petition, which explicitly acknowledged that the letter was sent after the district court's decision (*ibid.*), in no manner relied on that typographical error.

[3]Respondent argues (Br. in Opp. 9) that we incorrectly rely on a conflict between the Tenth Circuit's decision in this case and the Fourth Circuit's decision in *Dixon* v. *Westinghouse Electric Corp.*, 787 F.2d 943 (1986), petition for cert. pending, No. 86-181, on the distinct issue whether a state agency's decision, pursuant to a worksharing agreement with the EEOC, to allow the EEOC to process initially a charge renders inapplicable Title VII's 300-day limitations period for charges subject to overlapping federal and state jurisdiction. While such a conflict plainly does exist—as the Tenth Circuit itself recognized (see Pet. App. 5a-6a)—we do not seek review of that aspect of the decision below, which was favorable to the EEOC.

the charge immediately. In our view, the belief, shared by respondent and the Tenth Circuit, that Congress intended in that circumstance to require either the EEOC to delay its own action for 60 days or for the state agency to completely and forever relinquish its jurisdiction over the charge, turns on its head the very purpose of Title VII's deferral requirement: deference to state fair employment practice agencies. Respondent may believe (Br. in Opp. 12) that worksharing agreements constitute a "sleight-of-hand, paper shuffling procedure" to evade the requirements of Title VII. We believe, however, that such agreements reflect precisely the sort of cooperative federalism Congress hoped to encourage in Title VII when it included Section 706(c)'s deferral requirement.[4]

For the foregoing reasons and the reasons stated in the petition, the petition for a writ of certiorari should be granted.

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[4]Respondent's challenge (Br. in Opp. 12) to the terms of an EEOC procedural regulation, 29 C.F.R. 1601.13(a)(3), which provided that a charge is deemed "filed" with the EEOC upon its initial receipt when the charge is apparently untimely under the state statute of limitations, is misdirected. The Tenth Circuit rejected the regulation in this case (Pet. App. 6a-7a) and we do not rely on the regulation in our petition to support the timeliness of the filing of the charge with the EEOC in this case, which we maintain timely occurred at least when the agency formally declined to process initially the specific charge here at issue. The EEOC, moreover, has recently deleted the regulation. See 52 Fed. Reg. 10224-10225 (1987).

Respectfully submitted.

CHARLES FRIED
Solicitor General

CHARLES A. SHANOR
General Counsel
Equal Employment Opportunity Commission
Washington, D.C. 20507

JUNE 1987

JOINT

APPENDIX

No. 86-1696 (4)

In the Supreme Court of the United States

OCTOBER TERM, 1987

EQUAL EMPLOYMENT OPPORTUNITY COMMISSION,
PETITIONER

v.

COMMERCIAL OFFICE PRODUCTS COMPANY

ON WRIT OF CERTIORARI TO THE UNITED STATES
COURT OF APPEALS FOR THE TENTH CIRCUIT

JOINT APPENDIX

JAMES L. STONE
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PETITION FOR A WRIT OF CERTIORARI FILED APRIL 22, 1987
CERTIORARI GRANTED JUNE 15, 1987

In the Supreme Court of the United States

OCTOBER TERM, 1987

No. 86-1696

EQUAL EMPLOYMENT OPPORTUNITY COMMISSION,
PETITIONER

v.

COMMERCIAL OFFICE PRODUCTS COMPANY

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

JOINT APPENDIX

TABLE OF CONTENTS *

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* The opinion and judgment of the court of appeals and the district court order are printed in the appendix to the petition for a writ of certiorari and have not been reproduced.

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLORADO

85-1385

EQUAL EMPLOYMENT OPPORTUNITY COMMISSION,
PLAINTIFF

v.

COMMERCIAL OFFICE PRODUCTS CO., DEFENDANT

DOCKET ENTRIES

DATE	PROCEEDINGS
5-21	PETITION FOR AN ORDER ENFORCING ADMINISTRATIVE SUBPOENA—EEOC Issued Summons
5/22	NOTICE OF HEARING (JLK) . . . on the Petition for Enforcement of Administrative Subpoena on 6/6/85 at 8:15 . . . com . . . eod 5/23/85
5/29	Marshal Return S&C w/acknowledgment of service of S&C on James Stone atty 5/23/85
	REPLY to Petition for Order Enforcing Administrative Subpoena . . . COM
	Brief in opposition to Petition for ORDER Enforcing Admin Subpoena . . COM
6/6	HEARING (JLK) . . . ORDERED: Petition to Enforce Subpoena is DENIED . . . eod 6/6/86
	ORDER OF DISMISSAL (JLK) . . . that the petition to enforce administrate [sic] subpoena is denied and this complaint and civil action are dismissed . . . com . . . eod 6/10/85

DATE	PROCEEDINGS
6/27	MOTION to Alter or Amend Judgment Pursuant to Rule 59 Federal Rules of Civil Procedure by petitioner . . . cos
	Brief in Support of Motion to Alter or Amend Judgment Pursuant to Rule 59 F.R.C.P. by Petitioner . . . cos
6/18	MINUTE ORDER (JKL) . . . the motion to alter or amend judgment is DENIED . . . com . . . eod 6/18/85

UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT

85-2224

EQUAL EMPLOYMENT OPPORTUNITY COMMISSION,
PLAINTIFF-APPELLANT

v.

COMMERCIAL OFFICE PRODUCTS CO.,
DEFENDANT-APPELLEE

DOCKET ENTRIES

DATE	FILING-PROCEEDINGS
8/15/85	CS. DKT Case docketed
	ROA. DUE Record on appeal due 8/24/85
	DKT. ST. DUE Docketing statement due 9/4/85
8/26/85	ROA DUE Record on appeal due 9/23/85 (TOF).
	NAPR.F. Entry of appearance filed by Stone as attorney for the Appellee.
8/27/85	DKT.ST.F. Appellant' docketing statement filed. Orig. & 6 cc.c/s.
8/30/85	DKT.ST.F Signed copies of Docketing Statement filed, Original & 6 cc c/s.
8/30/85	NAPR.F. Notice of appearance filed by Johnson as attorney for Appellant.
9/25/85	ROA.F Record on appeal filed, Vol. I (Pleadings) (143pp); Vol. II (Transcript) (12pp), Origs. (155tpp)

DATE	FILING-PROCEEDINGS
11/26/85	NAPR.F Notice of appearance filed by Duplinsky as attorney for appellant
12/18/85	O.ASGN.CAL Order assigned to Calendar B—Holloway (parties served
	BR.DUE Appellant's brief due 1/8/86
1/13/86	O.RMK. Appellant's brief due 1/23/86, pursuant to Rule 15.
1/13/86	BR.F. Appellant's brief filed 2cc. c/s.
1/21/86	BR.F Extra copies of appellant's brief filed
1/27/86	M.EXTM.BR.DISP. Appellee's motion for extension of time to 2/18/86 to file brief filed 1/24/86 & granted-HKP (orig & 3cc, c/s) (parties served by mail)
1/29/86	BR.F. Additional copies of appellant's brief filed
2/19/86	BR.F. Appellees' brief filed, orig & 9cc, c/s
3/7/86	M.EXTM.BR.F/DISP Appellant's (EEOC) motion for extension of time to 3/28/86 to file reply brief filed, orig. + 3cc., c/s, and granted HKP (parties served by mail)
3/25/86	HRG.SET.MAY'86 TERM, DENVER
4/8/86	BR.F. Appellant's reply brief filed, orig. + 9cc, c/s
4/28/86	ADD.AUTH.F/SUBM. Appellant's additional authority to brief filed, orign and 10 cc. c/s, and submitted to panel.
5/15/86	C/S ARG. SUBM-case argued and submitted-McKay, Seth, Tacha
10/15/86	OPN.F Published, signed opinion filed-McKay, Seth, Tacha. Writing Judge is Tacha. (parties served by mail)

DATE	FILING-PROCEEDINGS
	DIS.OPN.F Published, dissenting opinion filed by McKay. (parties served by mail)
	JM.DISP Judgment is affirmed.
10/24/86	M.EXTM.F.P.REHRG.F/DISP Appellant's motion for extension of time to 11/14/86 to file petition for rehearing granted to 11/12/86—TAS. (parties served by mail)
11/13/86	P.REHRG.ENB.F/SUBM Appellant's petition for rehearing, with suggestion for rehearing en banc, file 11/12/86, orig. + 12cc., c/s, and submit to panel.
12/23/86	P.REHR (ENB.DISP Appellant's petition for rehearing, with suggestion for rehearing en banc, denied—en banc panel. (parties served by mail).
1/5/87	MDT.ISS Mandate issued to district court.
[1/21/87]	ROARMK. Letter re record
1/6/87	MDT.RCPT.F Mandate receipt filed.
1/30/87	ROA.RTN.DC. Record on appeal returned to district court (Vol I-II)
[2/2/87]	ROA.RCPT.F. Record receipt filed
5/1/87	P.Writ.CERT.F. Appellant's petition for writ of certiorari filed on April 22, 1987. Supreme Court No. is 86-1696.
6/22/87	P.WRIT.CERT.DISP Appellant's petition for writ of certiorari is granted by the Supreme Court. June 15, 1987.

AFFIDAVIT

STATE OF COLORADO)
) ss.
CITY AND COUNTY OF DENVER)

I, Walden Silva, being duly sworn on my oath, depose and state:

1. I make this Affidavit in support of the Equal Employment Opportunity Commission's ("EEOC" or "Commission"), Petition for an Order Enforcing an Administrative Subpoena.

2. I make this Affidavit on the basis of my own personal knowledge and my review of the Commission's investigative file entitled *Suanne Leerssen* vs. *Commercial Office Products Company*, Charge No. 081841964.

3. I am the Director of the EEOC's Denver District Office and as such I am the custodian of the Commission's investigative files in this office.

4. The Denver District Office is responsible for the investigation of charges alleging that employers within the states of North Dakota, South Dakota, Montana, Wyoming, Colorado and Nebraska have committed employment discrimination in violation of Title VII of the Civil Rights Act, 1964, as amended 42 U.S.C. § 2000-e, *et seq.* (Supp. V, 1975).

5. On March 26, 1984, Suanne Leerssen, Charging Party, filed a charge of discrimination with the EEOC against Commercial Office Products Company ("Employer") alleging that she was discharged by the Employer because of her status (Pregnant) and her sex (Female). Charging Party alleged that she had been discharged on or around June 10, 1983. (Exhibit 1).

6. On March 30, 1984, the Colorado Civil Rights Division, (CCRD), sent a Charge Transmittal to the EEOC's Denver District Office stating that "pursuant to the worksharing agreement, this charge is to be initially processed by the EEOC." (Exhibit 2)

7. On March 30, 1984, a Notice of the Charge of Discrimination was sent to Commercial Office Products Company. (Exhibit 3).

8. From April to September 1984, the Denver District Office, through informal means, attempted to obtain information to allow it to proceed with its investigation of the charge. Throughout this time period, the Employer refused to provide any information that was requested by the EEOC stating that the EEOC lacked jurisdiction over the subject matter, because Ms. Suanne Leerssen filed her charge over six months from the date she was terminated. Six months beyond CCRD's Statute of Limitation for filing a charge. Further, the Employer alleges that the deferral requirements of § 706(c) of Title VII have not been met. Thus, based on that information, the Employer stated that the EEOC does not have jurisdiction over the charge.

9. In furtherance of the investigation of this charge, on September 20, 1984, I issued on behalf of the Commission, and had served upon Robert G. Tomlinson, President, Commercial Office Products Company an Administrative Subpoena requiring the Employer to produce certain evidence by September 28, 1984. Administrative Subpoena Number DE-84-09, was issued pursuant to Section 710 of Title VII, 42 U.S.C. Section 2000-9 and Section 1601.15(a), EEOC Procedural Regulations, 29 C.F.R. Section 1601.15 (a) (1983). (Exhibit 4).

10. On September 26, 1984, the Employer sent a Petition to Revoke or Modify Subpoena to the EEOC's Denver District Office. The Employer's reason for revoking the subpoena was that the six month Statute of Limitation to file a charge with the Colorado Civil Rights Division had expired prior to Ms. Leerssen filing her charge and the deferral requirements of § 706(c) of Title VII were not complied with. Thus, the Equal Employment Opportunity Commission is without jurisdiction in this matter, and therefore lacks authority to issue a subpoena pursuant to Section 1601.16 of the Commission's Procedural Regulations. (Exhibit 5).

11. On October 4, 1984, as the EEOC's Denver District Director, I, issued a Determination denying the Employer's Petition to Revoke or Modify Subpoena. (Exhibit 6).

12. On October 15, 1984, the Employer then submitted an appeal to the EEOC's Office of General Counsel for a Petition to Revoke or Modify Subpoena. The appeal was made pursuant to 29 C.F.R. 1601.16 (3)(b). (Exhibit 7).

13. On March 18, 1985, the Office of General Counsel issued a Determination denying the Employer's appeal. (Exhibit 8).

14. Following denial of the Employer's appeal, attempts were again made to obtain information necessary for the EEOC to conduct its investigation of Ms. Suanne Leerssen's charge. However, in a letter dated April 11, 1985, the Employer again reiterated that the EEOC is without jurisdiction and it will not comply with the Subpoena. (Exhibit 9).

15. The documents and information sought from the Employer are not currently in the possession of the Commission; they have not been in the Commission's possession at any time in the past and the documents and information sought are relevant and essential to the Commissions' investigation of the charge in question.

16. Further, the Affiant saith not:

/s/ Walden Silva
WALDEN SILVA
District Director

Subscribed and sworn to before me this 20th day of May, 1985.

/s/ Veronica Pedroza
Notary Public
1531 Stout Street, 6th Floor
Denver, Colorado 80202

My Commission expires: March 29, 1989.

AFFIDAVIT

STATE OF COLORADO)
) ss.
CITY AND COUNTY OF DENVER)

I, Alfred Medina, being duly sworn on my oath, depose and state:

1. I am currently a Civil Rights Specialist employed by the Colorado Civil Rights Division (hereinafter referred to as "CCRD"). During the week of June 3, 1985, I was Acting Director of Compliance.

2. I make this Affidavit on the basis of my own personal knowledge regarding the processing of charges of employment discrimination filed with the CCRD or the EEOC (Equal Employment Opportunity Commission) which are then deferred to the CCRD.

3. I am knowledgeable and understand the Work-Sharing Agreement between the EEOC and CCRD on the processing of charges of employment discrimination filed in the State of Colorado.

4. Prior to making this Affidavit, I have reviewed a copy of the charge filed by Suanne Leerssen against Commercial Office Products Company, EEOC Charge No. 081841964 dated March 26, 1984, a copy of Charge Transmittal Form 212-A sent to CCRD by EEOC and dated March 30, 1984, and a copy of Form CCRD-D-2 sent to Ms. Leerssen by CCRD and dated April 4, 1984.

5. I have reviewed all documents which are currently in the possession of the CCRD regarding the charge filed by Suanne Leerssen against Commercial Office Products Company which consists of a copy of the charge filed by Ms. Leerssen with the EEOC, a Charge Transmittal sent to the CCRD by EEOC, a Form CCRD-D-2 sent to Ms. Leerssen by the CCRD and a message from Respondent's attorney, Brent Johnson, who requested a copy of the Form 212-A. Those are the only documents that are currently in the possession of the CCRD and the only

documents ever in the possession of the CCRD regarding the charge filed by Suanne Leerssen against Commercial Office Products Company.

6. I am aware that Colorado's Statute of Limitation for filing a charge of employment discrimination is six (6) months from the date of the occurrence of the alleged discriminatory act. This is pursuant to the Colorado Revised Statute, 24-34-403.

7. Colorado Civil Rights Commission (CCRC) does not have jurisdiction to process a charge of employment discrimination initially filed with the EEOC after six (6) months have elapsed from the date of the alleged discriminatory act, even though the EEOC might voluntarily defer such charge to the CCRD, such deferred charges are untimely under C.R.S. 24-34-403. Such charges should be returned to the EEOC and not given a CCRD charge number. Further, even after the EEOC has completed its processing of such case, the CCRD would not review nor comment on the finding of the EEOC in that the CCRD would not have had jurisdiction over the case.

8. Regarding the Leerssen charge, the CCRD made several inadvertent administrative errors in handling the charge after it was deferred to the CCRD by the EEOC. Those errors were as follows:

a. A CCRD charge number should not have been assigned to the Leerssen charge since it was filed past the CCRC's State Statute of Limitation for filing a charge of employment discrimination.

b. The portion of the Form 212-A filled out by the CCRD was not correctly checked. Instead of the second box being checked, the third box should have been checked, which states: "This will acknowledge receipt of the referenced charge and indicate this Agency's intention to dismiss/close/ not docket the charge for the following reasons: . . ." CCRD should have stated that it would not

docket the Leerssen charge because it was filed past the State Statute of Limitation of six months.

c. The Form Letter CCRD-D-2 should not have been sent to Ms. Leerssen.

9. The CCRD did not have jurisdiction to process the Leerssen charge since it was untimely under C.R.S. 24-34-403. However, the CCRD deferral clerk did not recognize the untimeliness of the deferral and the EEOC at no time brought this to the CCRD's attention.

10. Upon learning of the CCRD's inadvertent administrative error (on or about June 7, 1985), in assigning a case number and forwarding the CCRD-D-2 Form, a letter was sent to the Charging Party and Respondent advising them that the CCRD erred in forwarding the CCRD-D-2 Form and never had jurisdiction over the deferred charge.

11. Further, the Affiant saith not.

/s/ Alfred B. Medina
ALFRED B. MEDINA
Civil Rights Specialist
Colorado Civil Rights Division

Subscribed and sworn before me this 14th day of June, 1985. My commission expires: 4-4-88.

/s/ [Illegible]
Notary Public
Address:

• • • • •

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLORADO

Civil Action No. 85-K-1385

EQUAL EMPLOYMENT OPPORTUNITY COMMISSION,
PLAINTIFF

vs.

COMMERCIAL OFFICE PRODUCTS CO., DEFENDANT

REPORTER'S TRANSCRIPT
(Hearing on Petition to Enforce Subpoena)

Proceedings before the HONORABLE JOHN L. KANE, JR., Judge, United States District Court for the District of Colorado, commencing at 8:15 a.m. on the 6th day of June, 1985, in Courtroom C-200, United States Courthouse, Denver, Colorado.

APPEARANCES:

For the Plaintiff:

RONALD W. TAOKA, ESQ.
Equal Employment Opportunity Commission
Denver District Office
1531 Stout Street, 6th Floor
Denver, Colorado 80202

For the Defendant:

JAMES L. STONE, ESQ.
BRENT T. JOHNSON, ESQ.
Fairfield & Woods
950 - 17th Street, #1600
Denver, Colorado 80202

[2] PROCEEDINGS

THE COURT: We have an 8:15 matter, EEOC V. Commercial Office Products. Are we ready to go on that?

MR. STONE: Yes, we are, Your Honor.

THE COURT: Good. This is the Equal Employment Opportunity Commission's petition for an order enforcing administrative subpoena.

Are you ready to proceed?

MR. TAOKA: Yes, Your Honor.

In the instant case, Your Honor, charging party Suanne L. Leersen, a lay person without aid of an attorney, filed a charge with the EEOC on the 289th day after the occurrence of the alleged discriminatory act. The EEOC immediately deferred the charge to the Colorado Civil Rights Division pursuant to EEOC procedural regulation 29 CFR 1601.13(a)(3), which states, "Charges arising in jurisdictions having a 706 Agency but which charges are apparently untimely under the applicable state or local statute of limitations are filed with the Commission upon receipt. Such charges are timely filed if received by the Commission within 300 days from the date of the alleged violation. Copies of all such charges will be forwarded to the appropriate 706 Agency."

Further, by deferring the charge to CCRD and allowing CCRD an opportunity to consider the Leersen charge, which is all that is necessary, the 9th Circuit, in *Saulsbury v. Wismer* [3] *and Becker, Inc.*, 644 F.2d 1251, at 1256, 9th Circuit, 1980, determined that the purpose of 42 U.S.C. 2000e-5(c) is not to ensure that state agencies take action, but to give respectful but modest deference to a state that has evidenced interest. Thus, when the state agency declines, for whatever reason, to pursue a complaint made to it, the failure of the state to follow through will not bar the initiation of a federal action so long as the state has had some opportunity to act on the complaint. CCRD, after having the opportunity to act on the Leersen charge, waived its right to first consider the

charge and essentially terminated its process during the charge. This was done pursuant to the work sharing agreement between the EEOC and CCRD.

In *Douglas v. Red Carpet Corporation of America*, 538 F.Supp. 1135, Eastern District of Pennsylvania, 1982, the Court held that where a relevant state agency has waived its right to first consider the plaintiff's complaint, the state deferral requirements of Title VII, 42 U.S.C. 2000e-5(c), becomes meaningless. It should be noted that it was incumbent on CCRD to terminate its process of the Leerssen charge because CCRD did not have jurisdiction over the charge because the charge was received by CCRD well after the six-month state statute of limitations for filing the charge, and it would serve no purpose for CCRD to have kept the charge for 60 days and waive the opportunity to have the charge processed. This would have [4] run contrary to the purpose of the work sharing agreements which are designated to facilitate the processing of the complaint, *New York Gaslight Club, Inc. v. Carey*, 447 U.S. 54, at 64.

Lastly, Your Honor, regardless of the semantical games that have been played with the word "terminate," the fact is that CCRD terminated its consideration of the Leerssen charge, thus when CCRD terminated its proceedings, the EEOC within 300 days obtained jurisdiction over the charge. To hold otherwise would be contrary to the law and the intent of Congress. Simply, the EEOC met all its requirements regarding the Leerssen charge before obtaining jurisdiction. Therefore, the EEOC's administrative subpoena should be enforced. Thank you.

THE COURT: Thank you.

MR. STONE: Good morning, Your Honor, my name is Jim Stone. I'm a lawyer with Fairfield & Woods. We represent the respondent, Commercial Office Products Company. Sitting at counsel table is Brent Johnson, a lawyer in our office.

We're here before you this morning, Your Honor, to request that you deny the relief asked for in the EEOC's

petition to enforce the administrative subpoena. The key issue is what constitutes termination under Section 706(c). The EEOC urges that termination doesn't necessarily mean to complete, to end or to conclude, but rather they suggest that the language should not be given its plain and ordinary meaning and that [5] waiver of initial processing is tantamount to termination.

This is not a situation which has been addressed in *Love v. Pullman* where a layman, unassisted by trained lawyers, gets lost in the statutory jungle of Title VII. This is a situation where we have two agencies, one state and one federal, each charged by their respective legislatures to implement and follow the mandates of those legislatures. These agents are supposedly experts, and their opinions are to have great weight, and we're to defer to their expertise, so this is not a situation where we have an uneducated layman trying to get through the maze. It's a situation where the EEOC and the CCRD have come upon a scheme or idea to somehow extend and enlarge the jurisdiction that Congress intended.

So there be no doubt about the actual termination, the Colorado Civil Rights Division did not actually terminate its proceedings. There are two documents that address this issue. First is the April 4, 1984 letter from the Colorado Civil Rights Division to the charging party. In that letter, the Colorado Civil Rights Division assigns the matter a number, it advises the charging party of certain action it may take and it tells the charging party that if she moves or changes her telephone number, that she is to keep them informed. The Equal Employment Opportunity Form 212 also demonstrates there has been no actual termination under Section 706.

We have addressed in our brief, Your Honor, the [6] mistaken interpretation or understanding by the local director concerning the processing of this Form 212, but the Form 212 is interesting because it allows the local agency three alternatives with respect to what it will do with a charge. The first alternative is that the agency

may express its intention to initially process the charge; the second alternative is that the agency may express its intention not to initially process the charge; and the third alternative is that the agency will express its intention to dismiss, close or not docket the charge.

It's interesting that in the EEOC's brief they attach a copy of Form 212. We understand it's the only form in their files which does not have the lower portion of the form completed. Attached to our brief you have the complete Form 212. I believe it's Exhibit G. That shows that the Form 212 was not received by the Colorado Civil Rights Division until April 3, 1984, a week or so after the EEOC commenced its investigation. The EEOC didn't wait in this case for the state to decide which alternative it would choose.

Paragraph 6 of the petition and paragraph 6 of the brief both state that on March 26th the EEOC commenced its investigation, but the Colorado Civil Rights Division did not choose one of its three alternatives until April 4, 1984, and the alternative it chose was to not initially process the charge. It didn't choose the third alternative, which would be [7] to dismiss, close or not docket the charge. Clearly, the third alternative would allow for an actual termination as is identified under 706(c).

What we have now is the EEOC attempting to invent a reason or invent an enlargement of the statute so that they can take advantage of the 300-day period, and their imagination and invention comes up with something that is akin to termination but not termination, and that is waiver of initial processing of a charge. The EEOC would like the Court to conclude that waiver of initial processing is equal to termination. Waiver of initial processing, the words themselves, imply that it is an equal determination. It isn't a complete ending or termination or conclusion of the matter; it indicates that some processing some time in the future will take place, subsequent processing perhaps.

That's not what 706 says. That interpretation is clearly contrary to the intent of Congress and the Supreme Court in the Tenth Circuit decisions. The pertinent language of 706(c) is clear and should be given its plain and ordinary meaning. If Congress intended that termination was equal to waiver of initial processing, 706(c) would read as follows: "No charge may be filed under subsection (b) of this section by the person aggrieved before the expiration of 60 days after proceedings have been commenced under the state or local law, unless such proceedings have been earlier terminated, or unless [8] the state agency waives initial processing of the charge." The statute doesn't contain that extra clause, "or unless the state agency waives initial processing of the charge."

We think there are five cases that are extremely important to deciding this issue. The two Supreme Court opinions, *Oscar Mayer* and *Mohasco*, have been briefed and discussed by both sides. There are two Tenth Circuit opinions, one, the *Oral Roberts* opinion, *Smith v. Oral Roberts*, and, second, *Wilson v. St. Louis-San Francisco Railway Company*, which was cited in some of our papers during the administrative proceedings but not cited in our brief. The *Wilson* case is found at 673 F.2d 1154, and at page 1154, the Tenth Circuit interprets the Supreme Court's decision in *Love v. Pullman*, and the Tenth Circuit says that the Supreme Court held that "Section 706(c) requirements are met when an individual files a complaint with the EEOC," that was done here, "which refers the complaint to the state agency," which was done here, "and delays its own investigation until 60 days have elapsed," that was not done here, "or the state agency has indicated it will take no action." That was not done here. The state agency indicated that it would take action.

Consequently, there has been no actual termination, there's been no termination under the Tenth Circuit opinions, and *Smith v. Oral Roberts* even uses stronger language in that opinion when it adopts note 16 of *Mohasco*.

Finally the fifth [9] case is the *Klausner* decision out of the Northern District of New York, and we've also cited that in our brief. We think that the *Mohasco* decision is important for a number of reasons which I'll briefly highlight: first of all, note 16, which I've already mentioned; secondly, the instructive statements in the opinion concerning 706(c), and particularly the holding and conclusions of *Mohasco* where the Court applies 706(c) to the facts of that case and adds this 60 days to the date on which the charge was, quote, filed, and comes up with 351 days in saying that the charge would not be then timely.

The legislative history is discussed in detail in *Mohasco*, and note 32 I think is very telling on this point, and the dissenters even view the *Mohasco* ruling in a form which is consistent with what we're urging the Court here today to follow. They talk about a hypothetical charging party who is discharged nine months after his discharge. The dissenters say, what should the EEOC intake officers say to this person? And they conclude that the EEOC intake officer can tell this person that the answer to whether his charge is timely is maybe, and it's maybe because if the state agency terminates its proceedings before the 300th day, the EEOC will have jurisdiction, but if the Colorado Civil Rights Division does not terminate its proceedings before the 300th day, the EEOC will not be able to process the charge. The charge will not be filed because the EEOC will not have waited the mandatory 60 [10] days.

The *Klausner* decision, I would like to highlight a couple points in that. First of all, there's a letter in *Klausner* which is very similar, at least it appears in the opinion, to the April 4, 1984 letter from the Colorado Civil Rights Division to the charging party, and Form 212 again is before the Court. In *Klausner*, the United States District Court ruled that it would give 706(c) its plain and ordinary meaning, that waiver of initial processing was not termination, it was something else,

and held, consequently, that the EEOC had not followed the mandate of Congress. It had not deferred to the state agency for the 60-day period; consequently, it could not accept for filing the charge. Based upon that, Your Honor, we request that you follow the rationale of *Klausner*, that you hold that waiver of initial processing is not tantamount to termination. It's not what Congress intended, and we request that the Equal Employment Opportunity Commission's petition be denied. Thank you.

THE COURT: Thank you. Mr. Taoka.

MR. TAOKA: Going into the briefs, Your Honor, I would like to reiterate that the CCRD could not process this charge. It did not have jurisdiction over the Leerssen charge since it was filed after the state's six-month statute of limitations, unlike *Mohasco*, which could take jurisdiction after 180 days because its state statute of limitations is one year, and that [11] is the difference between the two cases.

Respondent cited *Klausner*, and in our brief we have four cases which support our position. I think *Klausner* is the only case that I know of that supports their position. That's all.

THE COURT: I think *Klausner* is persuasive. The petition to enforce the subpoena is denied. We'll be in recess.

(The proceedings were concluded at 8:30 a.m. on the 6th day of June, 1985.)

[12] REPORTER'S CERTIFICATE

I, Lolita Hurst, Certified Shorthand Reporter and Official Reporter to this Court, do hereby certify that I was present at and reported in shorthand the proceedings in the foregoing matter; that I thereafter reduced my shorthand notes to typewritten form, comprising the foregoing official transcript; further, that the foregoing official transcript is a full and accurate record of the proceedings described in this matter on the date set forth.

Dated at Denver, Colorado, this 23rd day of September, 1985.

/s/ Lolita Hurst
LOLITA HURST, CSR

SUPREME COURT OF THE UNITED STATES

No. 86-1696

EQUAL EMPLOYMENT OPPORTUNITY COMMISSION,
PETITIONER

v.

OFFICE PRODUCTS COMPANY

ORDER ALLOWING CERTIORARI

The petition herein for a writ of certiorari to the *United States Court of Appeals for the Tenth Circuit* is granted.

☆ U. S. GOVERNMENT PRINTING OFFICE: 1987 181403 40010

PETITIONER'S

BRIEF

(5)

No. 86-1696

FILED

AUG 27 1987

JOSEPH F. SPANIOL, JR.
CLERK

In the Supreme Court of the United States

OCTOBER TERM, 1987

EQUAL EMPLOYMENT OPPORTUNITY COMMISSION,
PETITIONER

v.

COMMERCIAL OFFICE PRODUCTS COMPANY

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

BRIEF FOR THE PETITIONER

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QUESTION PRESENTED

Whether a state agency's routine decision to defer initial processing of a discrimination charge to the Equal Employment Opportunity Commission (EEOC), pursuant to a worksharing agreement, constitutes a "terminat[ion]" of state proceedings within the meaning of Section 706(c) of Title VII of the Civil Rights Act of 1964, 42 U.S.C. 2000e-5(c), so that the EEOC may immediately deem the charge as filed, rather than being required to wait until sixty days after the commencement of state proceedings.

TABLE OF CONTENTS

TABLE OF AUTHORITIES

In the Supreme Court of the United States

OCTOBER TERM, 1987

No. 86-1696

EQUAL EMPLOYMENT OPPORTUNITY COMMISSION,
PETITIONER

v.

COMMERCIAL OFFICE PRODUCTS COMPANY

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

BRIEF FOR THE PETITIONER

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-20a) is reported at 803 F.2d 581. The order of dismissal of the district court (Pet. App. 23a) is unreported.

JURISDICTION

The judgment of the court of appeals (Pet. App. 21a) was entered on October 15, 1986. A petition for rehearing was denied on December 23, 1986 (Pet. App. 22a). By order dated March 16, 1987, Justice White extended the time for filing a petition for a writ of certiorari to and including April 22, 1987. The petition for a writ of certiorari, which was filed on April 22, 1987, was granted on June 15, 1987

(J.A. 21). The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATUTORY PROVISIONS INVOLVED

Section 706(c) of Title VII of the Civil Rights Act of 1964, 42 U.S.C. 2000e-5(c), provides in pertinent part:

> In the case of an alleged unlawful employment practice occurring in a State, or political subdivision of a State, which has a State or local law prohibiting the unlawful employment practice alleged and establishing or authorizing a State or local authority to grant or seek relief from such practice or to institute criminal proceedings with respect thereto upon receiving notice thereof, no charge may be filed under subsection (a) of this section by the person aggrieved before the expiration of sixty days after proceedings have been commenced under the State or local law, unless such proceedings have been earlier terminated * * *.

Section 706(e) of Title VII of the Civil Rights Act of 1964, 42 U.S.C. 2000e-5(e), provides in pertinent part:

> A charge under this section shall be filed within one hundred and eighty days after the alleged unlawful employment practice occurred * * * except that in a case of an unlawful employment practice with respect to which the person aggrieved has initially instituted proceedings with a State or local agency with authority to grant or seek relief from such practice or to institute criminal proceedings with respect thereto upon receiving notice thereof, such charge shall be filed by or on behalf of the person aggrieved within three hundred days after the alleged unlawful employment practice occurred, or within thirty days after receiving notice that the State or local agency has terminated the proceedings under the State or local law, whichever is earlier * * *.

STATEMENT

1. In Title VII of the Civil Rights Act of 1964, 42 U.S.C. 2000e *et seq.*, Congress attempted to coordinate federal and state efforts to resolve charges of employment discrimination over which both the EEOC (under Title VII) and a state or local fair employment practice agency (under state or local law) have jurisdiction. Under Section 706(e) of Title VII, 42 U.S.C. 2000e-5(e), a complainant must file charges with the EEOC within 180 days of the alleged discrimination, except that if a complainant has "initially instituted proceedings with a State or local agency with authority to grant or seek relief," the complainant may file charges within 300 days of the alleged discrimination, or within 30 days after receiving notice of the termination of those state or local proceedings, whichever is earlier. When there exists concurrent jurisdiction in a state or local agency and the EEOC, moreover, Section 706(c), 42 U.S.C. 2000e-5(c), provides that a charge is not deemed to be "filed" with the EEOC "before the expiration of sixty days after proceedings have been commenced under the State or local law, unless such proceedings have been earlier terminated."[1] Hence, when there is a state or local

[1] In order to ensure compliance with Section 706(c)'s deferral requirement, the EEOC accepts charges of discrimination from individuals who have not previously filed claims under state law, and then transmits a copy of the charge to

agency with concurrent jurisdiction, a charge is always timely filed with the EEOC if, following its receipt by the EEOC, state or local proceedings are commenced within 240 days of the discriminatory act, while a charge received by the EEOC after 240 days will be timely filed only if the state or local agency "terminate[s]" those proceedings by the 300th day. *Mohasco Corp.* v. *Silver*, 447 U.S. 807, 817 (1980).

Congress also authorized the EEOC to cooperate with state and local agencies by entering into "written agreements" with those agencies in order to promote "effective enforcement" of Title VII. See 42 U.S.C. 2000e-8(b); see also 42 U.S.C. 2000e-4(g)(1). Accordingly, the EEOC has entered into "worksharing agreements" with approximately 81 of the 109 designated state and local fair employment practice deferral agencies that enforce state and local employment discrimination laws. These agreements typically provide that the state agency will initially process certain categories of charges and that the EEOC will initially process others, with the state waiving its right to the 60-day exclusive processing period in the latter instance. See 29 C.F.R. 1601.13(c). In either instance, the deferring agency normally reserves the right to review the initial processing agency's findings of fact, which the EEOC must accord "substantial weight" (see 42 U.S.C. 2000e-5(b)), and, if appropriate, also to investigate a charge further after the initial processing agency has completed its proceedings.

2. On March 26, 1984, the complainant, Suanne Leerssen, submitted a charge to the EEOC, alleging

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the appropriate state or local agency. See *Love* v. *Pullman Co.*, 404 U.S. 522, 525-526 (1972).

that on June 10, 1983—290 days earlier—respondent, Commercial Office Products Company, had discharged her because of her sex (Pet. App. 2a, 27a). On March 30th, the EEOC transmitted a copy to the Colorado Civil Rights Division (CCRD), which had concurrent jurisdiction over the charge (*ibid.*). Attached was a transmittal form indicating that, pursuant to a worksharing agreement between the EEOC and the CCRD, the charge was to be initially processed by the EEOC (*id.* at 26a).[2] On April 4, 1984, the CCRD indicated on the transmittal form, which it sent back to the EEOC,[3] its "intention not to initially process the charge" (*id.* at 27a). On the same day, the CCRD sent a letter to the complainant, which advised her that "[t]o avoid duplication of effort, the * * * Division will take no action on your

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[2] The worksharing agreement then in effect provided, inter alia, that each agency would take "primary responsibility" for processing the charges first submitted to it (see Pet. App. 48a).

[3] Respondent suggests (Br. in Opp. 3) that the EEOC never received the charge transmittal form completed by the CCRD (see Pet. App. 27a). The EEOC disputed this same suggestion in the courts below. See Brief for Appellant EEOC 3. According to the EEOC, the CCRD maintains that it sent the form to the EEOC, as is contemplated by 1 EEOC Compliance Manual § 5.3 (1987), and additionally contacted the EEOC by telephone to transmit the agency's waiver orally. See Pet. App. 38a-39a. While the district court never made a formal factual finding on the issue, the court of appeals stated that the completed form had been sent back to the EEOC and the court no doubt presumed that the completed form had been received by the EEOC. See Pet. App. 2a ("The CCRD returned the charge transmittal form to the EEOC and indicated that the CCRD waived its right to initially process the charge."). In all events, neither court based its ruling on respondent's suggestion.

charge until the [EEOC] terminates its proceedings" (*id.* at 2a, 28a-29a).

The EEOC proceeded to investigate the complainant's charge. Pursuant to its investigative authority, the EEOC issued a subpoena for production of information that respondent had declined to provide (Pet. App. 2a, 30a-32a). Respondent refused to comply with the subpoena, and the EEOC initiated this action for judicial enforcement of the subpoena (*id.* at 2a, 33a-37a).

3. The district court dismissed the EEOC's subpoena enforcement action (Pet. App. 2a, 23a; J.A. 12-20), holding that the EEOC lacked authority over the charge, and, hence, could not subpoena respondent for production of information. The district court reasoned that under Section 706(c) of Title VII the complainant's charge could not be filed with the EEOC until 60 days after it was received by the CCRD, which was beyond the 300-day limitations period established by Section 706(e). Relying on *Klausner* v. *Southern Oil Co.*, 533 F. Supp. 1335 (N.D.N.Y. 1982), the court held that a state agency's waiver of its right to an exclusive period for initial processing of a charge did not constitute a "terminat[ion]" of state proceedings, within the meaning of Section 706(c), with the result that the charge could not be deemed filed with the EEOC and processing by that agency could not begin until expiration of the full 60-day statutory period.[4]

[4] On June 14, 1985, following the district court's decision, the CCRD wrote the complainant a letter stating that the Division had never had jurisdiction over her charge because it had not been filed with the Division within the limitations period provided by state law (180 days) (Pet. App. 55a-56a; see Reply Memo 4 n.2).

4. The court of appeals affirmed (Pet. App. 1a-20a). The court first held (*id.* at 5a-6a) that the 300-day limitations period was applicable because proceedings before the CCRD had been "initially instituted," within the meaning of Section 706(e). The court of appeals rejected (Pet. App. 6a) respondent's contention that the extended 300-day period was inapplicable because the complainant had filed her charge with the CCRD after the state's 180-day limitations period had run. The court of appeals, however, agreed with the district court that the complainant's charge was not filed within 300 days and that the EEOC therefore lacked authority to issue the subpoena (*id.* at 7a-16a).[5]

The court of appeals' decision rested on its conclusion (Pet. App. 9a) that a state agency "terminates" its "proceedings," within the meaning of Section 706(c), only when it "completely surrenders its jurisdiction over a charge." The court of appeals contended (Pet. App. 11a-12a (emphasis omitted)) that the EEOC's contrary construction of Title VII is inconsistent with congressional intent "that the state would act during its period of exclusive jurisdiction, and that the federal authorities would begin proceedings only if state proceedings failed to resolve the dispute." The court concluded (*id.* at 13a) that the EEOC's reliance on the terms of worksharing agreements entered into by the EEOC and state or local

[5] The court of appeals declined (Pet. App. 2a-3a) to rule on the question whether a subpoena enforcement proceeding is the appropriate stage at which to raise the timeliness of a Title VII charge as a defense, because that argument was not raised in the district court (*ibid.*). The EEOC does not challenge that aspect of the court of appeals' decision in this Court.

agencies was misplaced because "[w]orksharing agreements cannot serve as a substitute for deferral."

Examining the circumstances of this case, the court of appeals concluded (Pet. App. 12a-15a) that the CCRD had not "terminated" its "proceedings," within the meaning of Section 706(c).* The court stressed (Pet. App. 15a (footnote omitted)) that although the CCRD did waive its right to process the charge initially, it also retained jurisdiction—reserving the right to act after the EEOC terminated its proceedings—and, hence, "did not finally and unequivocally terminate its authority over [the] * * * charge." Accordingly, the court found (*id.* at 16a), the complainant's charge was not formally filed with the EEOC until 60 days after the charge was first filed with the CCRD, which was beyond the 300-day limitations period (the charge was not filed with the CCRD until at least 290 days after the alleged discrimination (see *id.* at 2a)).† For this reason, the

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* The court expressly disagreed (Pet. App. 8a-9a & nn.6-7) with the First Circuit's decision in *Isaac* v. *Harvard University*, 769 F.2d 817 (1985), which upheld the EEOC's view that a state agency's decision to waive initial processing constitutes a "terminat[ion]" of its "proceedings," within the meaning of Section 706(c). The court of appeals also distinguished (Pet. App. 13a n.13) its decision in this case from its previous decision in *Barela* v. *United Nuclear Corp.*, 462 F.2d 149 (10th Cir. 1972), where the court had upheld the timeliness of an employment discrimination charge referred by a state agency to the EEOC. The court noted (Pet. App. 13a n.13 (emphasis in original)) that in *Barela*, unlike in this case, "the state agency * * * made a decision to completely relinquish its authority to act on the charge at that point *or in the future*."

† The court also rejected (Pet. App. 15a n.14) the suggestion that the CCRD had terminated its proceedings prior to the 300th day because, as stated in its June 14, 1985, letter to the complainant (see note 4, *supra*), the charge was filed after the state limitations period had run and therefore the agency "at no time had jurisdiction over [the] charge." The court found that the state limitations period was not self-executing and that therefore the Colorado agency did possess jurisdiction at least until it wrote the letter to the complainant on June 14th, which was after the federal limitations period had run.

court ruled (*ibid.*), the EEOC also lacked authority to issue the subpoena.

Judge McKay dissented (Pet. App. 17a-20a). He contended that the meaning of "terminated" in Section 706(c) is ambiguous and that the court should therefore defer to the EEOC's reasonable interpretation, which is consistent with congressional intent to resolve doubts in favor of claimants and which has been upheld by every other court (except one district court) that has addressed the issue, including the First Circuit.

5. The EEOC filed a petition for rehearing and suggestion for rehearing en banc, which the court of appeals denied (Pet. App. 22a). Judges McKay, Logan, and Seymour voted in favor of rehearing en banc.

SUMMARY OF ARGUMENT

Section 706(c) provides that an employment discrimination charge may not be "filed" with the EEOC before the expiration of 60 days after commencement of any state or local proceedings under state or local law concerning the same allegations, "unless such proceedings have been earlier terminated." 42 U.S.C. 2000e-5(c). Section 706(c) therefore extends to states and localities that have enacted equal empioyment legislation the right to attempt resolution of discrimination claims arising within their boundaries for a period of up to 60 days before

the federal government intervenes. Section 706(c), however, also explicitly contemplates that the state or local agency may "terminate[]" its "proceedings" prior to the expiration of the sixty day period, and thereby allow the EEOC immediately to process the charge (if timely).

In this case, there is no dispute that the opportunity for an initial exclusive period of processing was extended to the Colorado Civil Rights Division (CCRD) and that the CCRD, with the expectation that the EEOC would "immediate[ly]" process the charge (see Pet. App. 49a), voluntarily waived its right initially to process the complainant's charge. The question raised in this case is whether the CCRD's waiver of initial processing fulfilled the deferral requirement of Section 706(c) and—because it occurred within the 300-day charge filing period provided in Section 706(e), 42 U.S.C. 2000e-5(e)—thereby permitted the EEOC to accept the charge as timely filed and, hence, immediately to process the charge.

It is our view—which is the interpretation of the agency (the EEOC) primarily responsible for implementation and enforcement of Title VII—that a charge may be deemed filed and, if timely, may be processed by the EEOC, once the state agency notifies the EEOC that it is declining to process the charge any further at present and wishes the EEOC immediately to process the charge instead. Contrary to the view shared by both the court of appeals (Pet. App. 15a) and respondent (Br. in Opp. 8-9), we do not believe that the EEOC was barred from acting for 60 days by the mere fact that the state agency in this case reserved the option to act after the EEOC processed the charge.

The language of Section 706(c) is ambiguous, and neither contradicts our view nor compels the construction given by the court of appeals. At the very least, the EEOC's interpretation represents a plausible reading of the statutory language. Moreover, related provisions of Title VII and the statute's legislative history refute the court of appeals' view and fully support the EEOC's consistent construction of the statute. They demonstrate that Congress included the state agency deferral requirement to provide state agencies with the "opportunity" to have an exclusive period for processing an employment discrimination charge. They suggest, moreover, that Congress did not intend to deprive a state agency of the option of allowing the EEOC to process a charge immediately without the state agency first formally relinquishing forever its jurisdiction over the charge. Finally, they show that Congress sought expeditious processing of charges and the elimination of wasteful duplication of federal and state efforts. The EEOC's construction of Section 706(c) is consistent with all of these expressions of congressional intent, which provide no meaningful support for the claim that a state must completely surrender its jurisdiction forever in order to "terminate[]" its "proceedings," within the meaning of that provision. The court of appeals' reading of the law, on the other hand, is inconsistent with congressional intent, in that it would disregard state and local agency preferences, invite needless delay, and prevent the consideration of numerous charges for no reason. The decision of that court therefore should be reversed.

ARGUMENT

A STATE OR LOCAL FAIR EMPLOYMENT PRACTICE AGENCY'S DECISION TO WAIVE ITS RIGHT INITIALLY TO PROCESS A CHARGE OF DISCRIMINATION "TERMINATE[S]" ITS "PROCEEDINGS," WITHIN THE MEANING OF SECTION 706(c) OF TITLE VII, SO AS TO ALLOW THE EEOC TO ASSERT IMMEDIATE JURISDICTION OVER THE CHARGE

The decision of the court of appeals misconstrues a statutory provision intended to allow state and local agencies the opportunity of an exclusive period for processing charges of unlawful employment discrimination. Under the court of appeals' (and respondent's) view, the EEOC must defer processing a discrimination charge even when the state or local agency has agreed that the EEOC should process immediately, and even when the charge will otherwise be barred by the applicable federal statute of limitations.[8] That decision frustrates Congress's clear intent "to encourage the prompt processing of all charges of employment discrimination" (*Mohasco Corp.* v *Silver*, 447 U.S. 807, 825 (1980)), turns on its head congressional intent to defer to state and local agency concerns, and needlessly prevents consid-

[8] The court of appeals agreed (Pet. App. 5a-6a) with the EEOC that the 300-day limitations period provided for by Section 706(e) is applicable in this case. In *Dixon* v. *Westinghouse Electric Corp.*, 787 F.2d 943 (1986), petition for cert. pending, No. 86-181, the Fourth Circuit concluded that the 300-day charge filing period, made available under Section 706(e) when the complainant "initially institute[s] proceedings" with a state or local agency, does not apply where (as in both *Dixon* and in this case) the state agency has entered into a worksharing agreement determining that the EEOC rather than the state will initially process the complainant's charge.

eration of some charges. There is no meaningful support in the legislative history for the court of appeals' assumption that a state and local agency cannot "terminate[]" its "proceedings," within the meaning of Section 706(c), without completely and forever relinquishing its jurisdiction over a charge.[9]

A. The Language Of Section 706(c) Does Not Require That A State Agency Completely and Forever Surrender Its Jurisdiction Over A Charge To Allow The Charge Immediately To Be Filed With The EEOC

While a court must surely "give effect to the unambiguously expressed intent of Congress," *Chevron U.S.A. Inc.* v. *Natural Resources Defense Council, Inc.*, 467 U.S. 837, 842-843 (1984) (footnote

[9] The numerous lower courts which have addressed the issue presented in this case are virtually unanimous in upholding the EEOC's construction of Section 706(c). *See Isaac* v. *Harvard University, supra*; *Hamel* v. *Prudential Insurance Co.*, 640 F. Supp. 103, 107 n.2 (D. Mass. 1986); *Hatzopoulou* v. *American Steel Foundries*, 39 Fair Empl. Prac. Cas. (BNA) 372 (N.D. Ill. 1985); *EEOC* v. *Ocean City Police Dep't*, 617 F. Supp. 1133, 1140-1141 (D. Md. 1985), aff'd on other grounds, 787 F.2d 955 (1986), rev'd on reh'g, 820 F.2d 1378 (4th Cir. 1987) (en banc); *Thompson* v. *International Ass'n of Machinists*, 580 F. Supp. 662, 665-667 (D.D.C. 1984); *Yeung* v. *Lockheed Missiles & Space Co.*, 504 F. Supp. 422, 424 (N.D. Cal. 1980); *Cattell* v. *Bob Frensley Ford, Inc.*, 505 F. Supp. 617, 618-619 (M.D. Tenn 1980); *Lombardi* v. *Margolis Wines & Spirits, Inc.*, 465 F. Supp. 99, 101-102 (E.D. Pa. 1979); see also *Stiessberger* v. *Rockwell International Corp.*, 29 Fair Empl. Prac. Cas. (BNA) 1273, 1274 (E.D. Wash. 1982); *Morgan* v. *Sharon Pennsylvania Bd. of Education*, 445 F. Supp. 142, 145 (W.D. Pa. 1978); *Greenlow* v. *California Dep't of Benefit Payments*, 413 F. Supp. 420, 424 (E.D. Cal. 1976); *EEOC* v. *Rinella & Rinella*, 401 F. Supp. 175, 184 (N.D. Ill. 1975); but see *Klausner* v. *Southern Oil Co.*, 533 F. Supp. 1335 (N.D.N.Y. 1982).

omitted), in this case the language of Section 706(c) does not "unambiguously express[]" congressional intent. Section 706(c) provides that "[i]n the case of an alleged unlawful employment practice occurring in a State, or political subdivision of a State [with concurrent jurisdiction] * * *, no charge may be filed [with the EEOC] * * * before the expiration of sixty days after proceedings have been commenced under the State or local law, *unless such proceedings have been earlier terminated* * * *" (42 U.S.C. 2000e-5(c) (emphasis added)). Contrary to the decision of the court of appeals (Pet. App. 8a-9a, 13a n.13 (emphasis in original)) the statutory phrase "unless such proceedings have been earlier terminated" does not unambiguously express congressional intent that a state agency must "completely surrender its jurisdiction over such a charge" and thereby "completely relinquish its authority to act on the charge at that point *or in the future*."

First, the plain meaning of "proceedings" in Section 706(c) is not the legal equivalent of "jurisdiction" or "authority." The term "proceedings" is ambiguous and its meaning, as this Court has noted in other circumstances, depends upon its statutory context. Compare *North Carolina Department of Transportation* v. *Crest Street Community Council, Inc.*, No. 85-767 (Nov. 4, 1986), slip op. 5-9 with *New York Gaslight Club, Inc.* v. *Carey*, 447 U.S. 54, 60-66 (1980). Congress's use of the term "proceedings" in Section 706(c), moreover, is consistent with the EEOC's reading of that provision. "[P]roceedings" may plausibly refer to only those initial proceedings commenced under state or local law. Section 706(c) provides that the full 60-day deferral period shall apply "unless *such* proceedings have been earlier

terminated" (emphasis added). The modifier "such" refers back to those proceedings already "commenced" under state or local law. The statutory language makes no explicit reference to those proceedings that the state agency might choose to initiate following the EEOC's determination. Contrary to the reasoning of the court of appeals, the language of Section 706(c) never specifically addresses the wholly distinct issue whether a state or local agency may have any continuing "jurisdiction" or "authority" over a charge once it has terminated its initial "proceedings."

The word "terminated" likewise does not unambiguously express Congress's intent that state or local agency jurisdiction must be forever abandoned. "Terminated" may plausibly refer to a "cessation in time"; it does not necessarily contemplate a cessation for all time. See *Webster's Third New International Dictionary* 2359 (Merriam-Webster ed. 1976) ("to bring to an ending or cessation in time, sequence, or continuity").[10] See also *Isaac* v. *Harvard University*, 769 F.2d 817, 821 (1st Cir. 1985) (emphasis omitted) (" 'Terminated' in section 706(c) could * * * mean a temporary cessation, or an ending of a defined segment of action.").

The plain meaning of the relevant statutory language therefore does not resolve this case. The language of Section 706(c) neither plainly and unmistakably endorses the EEOC's construction nor does it preclude that construction. At the very least, the statutory requirement that state or local "proceedings" be "terminated" may plausibly be read as

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[10] "Cessation" is defined as "a temporary or final ceasing or discontinuance (as of action)" *Webster's Third New International Dictionary*, *supra*, at 367.

being satisfied when, as in this case, the state agency has halted its investigation of a charge, deferred the matter to the EEOC for immediate processing, yet reserved the option of asserting its jurisdiction following the EEOC's determination.[11]

B. The Legislative History Supports The Reasonableness Of The EEOC's View That A Charge May Be Filed With The EEOC Under Section 706(c) Once A State Agency Waives Its Right Initially To Process A Charge And Seeks Immediate EEOC Jurisdiction

Because the meaning of Section 706(c) is not compelled by the plain meaning of its language, examination of the relevant legislative history is warranted. That history may shed further light on " 'the objects and policy of the law' " and, accordingly, on the meaning of the particular words chosen by Congress in the statute. *Kokoszka* v. *Belford*, 417 U.S. 642, 650 (1974) (quoting *Brown* v. *Duchesne*, 60 U.S. (19 How.) 183, 194 (1857)); see *United States* v. *Riverside Bayview Homes, Inc.*, No. 84-701 (Dec. 4, 1985), slip op. 10; *Chemical Manufacturers Ass'n* v. *Natural Resources Defense Council, Inc.*, 470 U.S. 116, 126 (1985); *Watt* v. *Alaska*, 451 U.S. 259, 266 (1981); *Train* v. *Colorado Public Interest Research Group, Inc.*, 426 U.S. 1, 9-10 (1976). In this case,

[11] The EEOC's construction of Section 706(c) is entitled to "great deference" and, if reasonable, should be upheld because the EEOC is the agency primarily responsible for implementation and enforcement of Title VII. See *Oscar Mayer & Co.* v. *Evans*, 441 U.S. 750, 761 (1979); *Griggs* v. *Duke Power Co.*, 401 U.S. 424, 433-434 (1971); see also *Clarke* v. *Securities Industry Ass'n*, No. 85-971 (Jan. 14, 1987), slip op 14-15; *Young* v. *Community Nutrition Institute*, No. 85-664 (June 17, 1986), slip op. 5-7; *Connecticut Dep't of Income Maintenance* v. *Heckler*, 471 U.S. 524 (1985).

examination of the legislative history shows that the EEOC's construction of Section 706(c) is reasonable because it is true to the policy and objectives that prompted Congress to adopt that provision's deferral requirement.

1. The relationship between the EEOC and state and local fair employment practice agencies under Title VII was an important topic of discussion and compromise in the legislative enactment of Title VII. The numerous civil rights bills initially proposed, including the version that passed the House (H.R. 7152, 88th Cong., 2d Sess., 110 Cong. Rec. 2511-2512, 12598 (1964)), did not include a state or local agency deferral requirement. The House-passed version instead "contained a 6-month limitations provision for the filing of charges with the EEOC, and directed the EEOC to enter into agreements with state agencies providing for suspension of federal enforcement" (*Mohasco*, 447 U.S. at 819 (footnote omitted)). Under that proposal, the EEOC was directed to "rescind any such agreement when it determines [the state] agency no longer has [power to eliminate and prohibit discrimination in employment], or is no longer effectively exercising such power" (H.R. 7152, *supra*, § 708(b), 110 Cong. Rec. 2511-2512 (1964)).

The House bill was criticized by Senator Dirksen, among others,[12] for allowing the exclusive jurisdiction of the state agency to hinge on the EEOC's judgment whether the state agency's authority was "ef-

[12] See, *e.g.*, 110 Cong. Rec. 5820 (1964) (remarks of Sen. Stennis) ("[T]he Federal Commission would be the sole judge of whether a State agency is effective. * * * [T]his Federal Commission may—without consent or review from anyone—completely disregard the State agency and assume full authority on equal employment matters in the States.").

fective[]." 110 Cong. Rec. 6449 (1964). According to Senator Dirksen (*ibid.*), "such language [is not] appropriate. The people of the State should have the right to determine the effectiveness of their agencies, consistent with the expressed purposes of this section." See also *id.* at 7784 (remarks of Sen. Smathers) (criticizes bill for its failure "to defer any Federal action until the State has had an opportunity to apply its own laws").

Proponents of the bill in the Senate at first opposed efforts to amend Title VII to address this concern.[13] They later agreed, however, to revise the language once it became apparent that some compromise would be necessary to overcome a filibuster that was jeopardizing the bill's passage. See 110 Cong. Rec. 12593-12595 (1964) (remarks of Sen. Clark); *id.* at 12580 (remarks of Sen. Humphrey); *Mohasco Corp.* v. *Silver*, 447 U.S. at 818-819. The aim of ensuing negotiations, which were led by Senators Mansfield and Dirksen, was "a practical solution for the

[13] See 110 Cong. Rec. 6550 (1964) (remarks of Sen. Humphrey) ("It has been suggested that this direction to the [EEOC to enter into agreement with State agencies] is not enough, that there should be some provision automatically providing for exclusive State jurisdiction where adequate State remedies for discrimination in employment exist. Such a proposal is unworkable. Congress cannot determine nor can we devise a formula for determining which State laws and procedures are adequate. * * * The Commission must have authority to determine in which States and in which classes of cases it will refrain from exercising its jurisdiction."); *id.* at 7214-7216 (Interpretative Memorandum submitted by floor managers Sens. Clark and Case in response to Sen. Dirksen's criticisms) ("Title VII leaves state and local [employment discrimination] laws untouched. * * * [I]t does not repeal any consistent State or local laws.").

problem which is involved where State and Federal jurisdictions are concerned" (110 Cong. Rec. 8192 (1964) (remarks of Sen. Dirksen)). As described by Senator Dirksen (*id.* at 8193), they sought, inter alia, to "develop language which will assure the States on" the problem "of the steady and deeper intrusion of the Federal power." These negotiations produced a bipartisan compromise substitute, known as the "Dirksen-Mansfield substitute," which ultimately became part of the 1964 Civil Rights Act. See 110 Cong. Rec. 11926-11935 (1964). The substitute proposed, among other things, adoption in Section 706(b) of the relevant language at issue in this case, which is currently set forth in Section 706(c).[14]

The debate surrounding the merits of this new language reveals the legislative purpose and policy that lay behind it. As described by this Court, "[t]he history identifies only one reason for treating workers in deferral States differently from workers in other States: to give state agencies an *opportunity* to redress the evil at which the federal legislation was aimed, and to avoid federal intervention unless its need was demonstrated." *Mohasco Corp.* v. *Silver*, 447 U.S. at 821 (footnote omitted; emphasis

[14] A 1972 amendment to Title VII added a new subsection (a) to Section 706. Section 706(b) and (d) in the 1964 version accordingly became Section 706(c) and (e) in the 1972 amended version. See *Mohasco Corp.* v. *Silver*, 447 U.S. 807, 820 n.31 (1980). References to those provisions in this brief are, unless otherwise indicated, based on the current (post-1972) version. The 1972 enactment also lengthened the limitations periods for the filing of charges with the EEOC from 90 to 180 days in nondeferral states and from 210 to 300 days in deferral states. See *id.* at 822.

added).[15] See, *e.g.*, 110 Cong. Rec. 12688 (1964) (remarks of Sen. Saltonstall) ("preserving the opportunity and authority of the State and local governments to work out their own problems if they are willing to do so"); *id.* at 12708 (remarks of Sen. Humphrey) ("Provisions have been inserted in * * * [T]itle[] [VII] to give States which have * * * fair employment practices laws * * * [the] reasonable opportunity to act under State law before the commencement of any Federal proceedings * * *."); *id.* at 12721 (remarks of Sen. Humphrey) ("[T]he individual complainant cannot file his charge with the [EEOC] until the State or local agency has been given an opportunity to handle the problem under State or local law."); *id.* at 13091 (remarks of Sen. Humphrey) ("to give the States the first opportunity"); *id.* at 14313 (remarks of Sen. Miller) ("[T]his bill gives the States the opportunity to

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[15] This Court has made this point repeatedly. See, *e.g.*, *Love* v. *Pullman Co.*, 404 U.S. 522, 526 (1972) (emphasis added) (Section 706(c) (then Section 706(b)) "give[s] state agencies a prior *opportunity* to consider discrimination complaints"); *New York Gaslight Club, Inc.* v. *Carey*, 447 U.S. at 63 (quoting *Oscar Mayer & Co.* v. *Evans*, 441 U.S. 750, 755 (1979) (emphasis added)) ("Title VII establishes a comprehensive enforcement scheme in which state agencies are given 'a limited *opportunity* to resolve problems of employment discrimination and thereby to make unnecessary, resort to federal relief by victims of the discrimination.'"); *Mohasco Corp.* v. *Silver*, 447 U.S. 807, 810 (1980) (emphasis added) (Section 706(c) "prohibits the filing of a[] * * * charge with * * * [EEOC] until after a state fair employment practice agency has had an *opportunity* to consider it"); *EEOC* v. *Shell Oil Co.*, 466 U.S. 54, 63 n.12 (1984) (emphasis added) ("the Commission may not initiate its own investigation until the appropriate state agency has been afforded an *opportunity* to investigate and resolve the matter").

carry out their responsibilities first * * *"); see also *id.* at 12724-12725 (remarks of Sen. Humphrey).

Senator Humphrey accordingly explained that the deferral provisions were added to make the substitute package a "States rights bill." 110 Cong. Rec. 12724-12725 (1964). Senator Dirksen stated that "instead of confusion and a waste of time, the result [of the substitute] would be time economy and the expeditious handling of cases" (*id.* at 9790; see *id.* at 8193 (remarks of Sen. Dirksen) ("assure individual complainants that they will have fair and expeditious consideration of their grievances")). Deference to the states and expeditious, nonwasteful processing of charges therefore were the principal motivating factors behind Congress's adoption of Section 706(c)'s deferral requirement.[16]

2. The EEOC's construction of Section 706(c) is consistent with those expressions of congressional intent. To permit the EEOC to assert immediate jurisdiction when the state declines initially to process a charge "serves the primary purpose of the statute—to give states the *chance* to go first in processing employment discrimination claims—while furthering the broad policy of Title VII to provide relief from such discrimination as quickly as possible." *Isaac* v. *Harvard University*, 769 F.2d at 826. Cf. *Love* v. *Pullman Co.*, 404 U.S. at 526 ("The proce-

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[16] See 110 Cong. Rec. 11935 (1964) (remarks of Sen. Dirksen) ("a measure at once practical, workable, equitable, and fair, and one which had a proper regard for what the States had done * * *"); *id.* at 13081 (remarks of Sen. Case) ("more concern or more deference could not be given to the rights of the States"); *id.* at 14329 (remarks of Sen. Brewster) ("The legislation that we are about to enact is moderate, and defers to State action and local solution.").

dure complies with the purpose both of § 706[(c)], to give state agencies a prior opportunity to consider discrimination complaints, and of § 706[(e)], to ensure expedition in the filing and handling of those complaints."). The state and local agencies are provided with the "opportunity" to have a 60-day exclusive period for processing the charge, yet they may choose to waive that right and not act. Deference to state and local agencies therefore is maintained under the EEOC's reading of Section 706(c)'s deferral requirement.

At the same time, Congress recognized that states would not always "choose to exercise [the] opportunit[y]" to resolve discrimination complaints and suggested that, in instances where the state is "unable or unwilling" to provide relief, "the Federal Government must have the authority to act." 110 Cong. Rec. 12725 (1964) (remarks of Sen. Humphrey). Only "if there is possible reason to believe that a State agency will deal with the matter, * * * will [it] have 60 days in which to deal with it, before the Federal agency can be called in * * *" (*id.* at 13090 (remarks of Sen. Case)). This principle—that the federal government has the authority to act when the state declines to exercise its deferral opportunity—is applicable regardless of the reason for the state's inaction. Cf. *Oscar Mayer & Co.* v. *Evans*, 441 U.S. at 761 ("Individuals should not be penalized if States decline, for whatever reason, to take advantage of the[ir] [deferral] opportunities.").

3. The legislative history also demonstrates the unreasonableness of respondents' and the court of appeals' proffered construction of Section 706(c). Indeed, their construction turns on its head the very

purpose of Title VII's deferral requirement: deference to State fair employment practice agencies.

In this case, for instance, the Colorado Civil Rights Division (CCRD) has affirmatively stated that it does not want to process the complainant's charge initially and that it instead wants the EEOC to process the charge immediately.[17] Respondent and the court of appeals nonetheless insist that Congress intended in the circumstances of this case to require either the EEOC to delay its own action until the 60-day period has run or for the State agency to relinquish completely and forever its jurisdiction over the charge. Either option frustrates important congressional policies expressed in the legislative history.

First, a 60-day delay[18] before processing by the EEOC "would serve no purpose." *Isaac* v. *Harvard University*, 769 F.2d at 825. During that period, the state agency would be unwilling to act and the EEOC would be unable to act.[19] Such a needless hiatus would

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[17] See Pet. App. 27a, 49a ("In order to avoid delay * * *, CCRC hereby waives its exclusive right to process those charges for 60 days * * * so that EEOC can take immediate action on such charges.").

[18] A delay of 120 days would be required in actions to enforce state anti-discrimination laws which have been in effect for less than one year. See 42 U.S.C. 2000e-5(c).

[19] The court of appeals suggested (Pet. App. 11a-12a (emphasis in original)) that a state's decision to defer to the EEOC does not terminate the state's proceedings for purposes of Section 706(c) because such a construction conflicts with "the unmistakable intention of Congress * * * that the state would *act* during its period of exclusive jurisdiction and that the federal authorities would begin proceedings only if state proceedings failed to resolve the dispute." As explained by the First Circuit in *Isaac* v. *Harvard University*, 769 F.2d at 821, however, "the statute plainly allows the EEOC to proceed

thwart Congress's clear intent "to encourage the prompt processing of all charges of employment discrimination." *Mohasco Corp.* v. *Silver*, 447 U.S. at 825 (footnote omitted); see S. Rep. 92-415, 92d Cong., 1st Sess. 24 (1971); 110 Cong. Rec. 8193 (1964) (remarks of Sen. Dirksen) ("assure individual complainants that they will have fair and expeditious consideration of their grievances"); see also *Love* v. *Pullman Co.*, 404 U.S. at 525-526.[20]

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in 60 days no matter what the state agency has done, so there is no rigid requirement that the state complete all of its business before the EEOC can act." Furthermore, the statute contains no requirement that states with equal employment opportunity laws take action on complaints within 60 days. If Congress had intended to impose such a requirement, it could have done so expressly.

Finally, the court of appeals' reliance (Pet. App. 10a n.10) on two comments by Senator Humphrey regarding the states' "responsibilities" under the statute is misplaced. As the court of appeals itself recognized (*id.* at 10a), Congress sought only "to encourage the states and the local communities to take a greater share of the responsibility" in guaranteeing equal rights. 110 Cong. Rec. 11936 (1964) (remarks of Sen. Humphrey); see also *Equal Employment Opportunity: Hearings Before the Special Subcomm. on Labor of the House Comm. on Education and Labor*, 87th Cong., 2d Sess. Pt. 2, at 960 (1962) (testimony of John B. Swainson, Governor of Michigan). Congress sought to "give[] the States an opportunity to carry out their responsibilities first; and then, if they do not do so, the Federal Government steps in" (110 Cong. Rec. 14313 (1964) (remarks of Sen. Miller)). There is no indication that Congress intended to require the EEOC to refuse to honor a state agency's decision to place initial responsibility for processing a charge in federal hands after the state agency has expressly relinquished its opportunity to process that particular charge further in the first instance.

[20] The 60-day delay would, of course, apply to all charges that the state agency defers to the EEOC, and not only to

The harm caused by such a requirement is not confined, moreover, to needless delay. As illustrated by the circumstances of this case, the position urged by respondent and accepted by the court below could needlessly render untimely thousands of pending Title VII employment discrimination charges that were received first by the EEOC more than 240 days after the alleged discriminatory act.[21] In such a situation, a charge submitted to the EEOC is therefore too early until it is too late, notwithstanding the state agency's desire for immediate EEOC processing.

The alternative option—for the state or local agency to "completely surrender its jurisdiction over a charge" (Pet. App. 9a)—likewise finds no support in the legislative history. Congress was concerned with safeguarding states' rights and providing states with a limited prior "opportunity" to act. The legislators evinced no intent to require state and local agencies to relinquish their jurisdiction forever in order to allow the EEOC immediately to process a charge. Rather, the wording of the deferral requirement, which received "meticulous attention" (110 Cong. Rec. 11935 (1964) (remarks of Sen. Dirk-

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those charges filed more than 240 days after the alleged discriminatory event. During the period of time covering fiscal year 1986 and three quarters of fiscal year 1987 (October 1, 1985 to June 30, 1987), the EEOC itself initially received approximately 93,450 Title VII charges within 240 days of the alleged violation.

[21] For example, between October 1, 1985 and June 30, 1987, the EEOC received approximately 108,554 Title VII charges beyond 240 days.

sen)),[22] suggests that whether a state or local agency retains some modicum of jurisdiction was not a matter of concern to Congress. In particular, Congress's choice of the term "proceedings" suggests that Congress was concerned with simultaneous federal and state (or local) agency investigations and hearings. Most likely, Congress hoped to render more meaningful any state or local proceedings initially instituted by barring the instigation of any simultaneous federal proceedings for at least 60 days. The problem of simultaneous proceedings is not raised when, as in this case, the state agency allows the EEOC initially to process the charge and the state agency merely retains jurisdiction over the charge so that it might act following termination of the EEOC proceedings.

There are also legitimate, noncontroversial reasons why a state agency might prefer not to relinquish authority over a charge for all time. The EEOC does not relinquish its authority under federal law when a state agency is processing a charge and a state agency may prefer to maintain an equivalent and symmetrical relationship with the EEOC when, pursuant to a worksharing agreement with the state agency, the EEOC is initially processing the charge. The state may simply prefer to avoid the appearance of state abdication of state authority or there may be very concrete reasons why it is unwilling to relinquish completely its jurisdiction. Where, for example, the state employment discrimination statute provides broader coverage than does Title VII, the EEOC's

[22] The drafters were "mindful of every word, of every comma, and of the shading of every phrase" (110 Cong. Rec. 11935 (1964) (remarks of Sen. Dirksen); see also 110 Cong. Rec. 12688 (1964) (remarks of Sen. Saltonstall)).

initial investigation might subsequently reveal that the Commission lacks jurisdiction under Title VII because the employer does not have 15 employees or because the employer is a bona fide private membership club (see 42 U.S.C. 2000e(b)). In such a case, where state law applies to an employer with fewer than 15 employees or to a bona fide private membership club, the complainant's sole administrative remedy would be with the state agency under state law. If the state or local agency had "completely surrendered its jurisdiction," however, the individual complainant would be without a remedy.[23]

Hence, the second option would flout the preferences of those very state and local agencies to which Congress so plainly intended in Title VII to defer. The state and local agencies have registered in their worksharing agreements with the EEOC their preference for retaining some residual jurisdiction over a charge even while allowing the EEOC initially to process the charge in their stead.[24] The legislative history no-

[23] There are also many sound reasons why a state may want to waive initial investigation of a charge. For example, it may have insufficient resources to process all charges efficiently or adequately, or it may believe that the EEOC will be better able to investigate or conciliate certain charges. As the First Circuit in *Isaac* explained (769 F.2d at 825-826), "[a] state which seeks to waive initial processing because of inadequate finances or heavy workload would be unable to secure the quick attention to its citizens' claims offered by the worksharing agreements * * *."

[24] With the possible exception of Oklahoma and Tennessee, none of the numerous worksharing agreements entered into between the EEOC and the various state and local fair employment practice agencies appears to contemplate a complete relinquishment of agency jurisdiction upon waiver of the right to a period of exclusive processing.

where suggests that Congress intended to deny the agencies that option. It instead expresses a general intent to accommodate their desires. Respondent's invitation to restrict the ability of state and local agencies to terminate their proceedings under Section 706(c) therefore should be declined.

C. Other Provisions Of Title VII Support the EEOC's View That The State Agency's Waiver Of Initial Processing "Terminates" Its "Proceedings" For Purposes Of Section 706(c)

The reasonableness of the EEOC's construction of Section 706(c) is also supported by expressions of congressional policy and purpose manifested elsewhere in other, related, parts of Title VII. See *Kokoszka* v. *Belford*, 417 U.S. at 650 (quoting *Brown* v. *Duchesne*, 60 U.S. (19 How.) at 194) ("When 'interpreting a statute, the court will not look merely to a particular clause in which general words may be used, but will take in connection with it the whole statute * * * and the objects and policy of the law, as indicated by its various provisions' * * *."). These provisions reflect a congressional commitment to respect a state or local agency request, not coupled with a total relinquishment of its jurisdiction, that the EEOC immediately assert jurisdiction over a charge. They also show that Congress favored the type of federal-state cooperative efforts attacked by respondent in this case.

1. Section 706(d) of Title VII provides that when a charge is filed by a member of the EEOC alleging an unlawful employment practice occurring in a state or locality with concurrent jurisdiction, "the Commission shall, before taking any action with respect to such charge, notify the appropriate State or local

officials and, upon request, afford them a reasonable time, but not less than sixty days * * *, *unless a shorter period is requested*, to act" (42 U.S.C. 2000e-5(d) (emphasis added)). Congress thus expressly provided that a state agency could, for whatever reason, appropriately notify the EEOC that it should proceed immediately to process a charge filed by a member of the EEOC. There is no requirement that the state agency completely and forever surrender its jurisdiction over the charge. Nor must the EEOC needlessly delay its efforts for the full 60-day period once the state agency has notified the EEOC that it should proceed without further delay.

It is reasonable to assume that Congress intended the same result for those charges within the scope of Section 706(c). The variation in wording between Section 706(c) (60 days "unless such proceedings have been earlier terminated") and (d) (60 days "unless a shorter period is requested") does not suggest otherwise. As this Court has previously remarked in a different context, the "difference in wording between § 706(b) [now (c)] and § 706(c) [now (d)] seems to be only a reflection of the different persons who initiate the charge." *Love* v. *Pullman Co.*, 404 U.S. 522, 526-527 n.6 (1972) (citing *Developments in the Law, Employment Discrimination and Title VII of the Civil Rights Act of 1964*, 84 Harv L. Rev. 1109, 1214 n.117 (1971)). Moreover, there are repeated statements in the legislative history that Congress intended the "same" time limitations to apply in Section 706(c) and (d). See 110 Cong. Rec. 12690 (1964) (remarks of Sen. Saltonstall); *id.* at 15896 (remarks of Rep. Celler); see also Staff of the Subcomm. on Labor of the Senate Comm. on Labor and Public Welfare, 92d Cong., 2d Sess., *Legislative*

History of the Equal Employment Opportunity Act of 1972, at 1771 (Comm. Print 1972) (remarks of Sen. Williams).

2. The EEOC's construction of Section 706(c) is also supported by those provisions of Title VII in which Congress sought to promote federal-state cooperative efforts. The prospect of federal-state cooperative efforts in redressing employment discrimination was widely applauded by all sides during the formulation of the equal employment legislation and during the subsequent legislative debates on Title VII,[26] and Section 705(g)(1) of Title VII accordingly authorizes the EEOC "to cooperate with and, with their consent, utilize regional, State, local, and other agencies * * *" (42 U.S.C. 2000e-4(g)(1)). Section 709(b) more specifically provides that "[i]n furtherance of such cooperative efforts, the Commission may enter into written agreements with such State or local agencies * * *." 42 U.S.C. 2000e-8(b).

Pursuant to those provisions, the EEOC has entered into worksharing agreements with 43 states, the Dis-

[26] See, *e.g.*, 110 Cong. Rec. 1521 (1964) (remarks of Rep. Celler) ("Through cooperative efforts with State and local agencies, title VII envisions an effective and harmonious mobilization of Federal, State, and local authorities in attacking this national problem."); *Equal Employment Opportunity: Hearings Before the Special Subcomm. on Labor of the House Comm. on Education and Labor*, 87th Cong., 1st Sess. Pt. 1, at 6 (1961) (testimony of Rep. Roosevelt) ("[W]e want to be able to put into any proposed legislation, the kind of language which would assure full cooperation and preclude any possibility of interference."). See also 110 Cong. Rec. 2602 (1964) (remarks of Rep. Dent); *id.* at 7205 (remarks of Sen. Clark); *id.* at 8193 (remarks of Sen. Dirksen); *id.* at 11848, 13091 (remarks of Sen. Humphrey); *id.* at 12617 (remarks of Sen. Muskie).

trict of Columbia, Puerto Rico, and the Virgin Islands, and approximately 35 local agencies. These worksharing agreements seek to maximize the efficiency of both state and federal efforts and to minimize the burden on employers by avoiding simultaneous state and federal proceedings. They are predicated upon a "division of labor" of charge processing; under these agreements, the state or local agency agrees to waive initial processing rights over some charges to permit expeditious federal processing and to allow the state or local agency to focus its resources on cases that the EEOC is not simultaneously processing. The EEOC's construction of Section 706(c), which provides that such a waiver "terminate[s]" state or local "proceedings" so as to permit the EEOC immediately to process a charge (see 29 C.F.R. 1601.13(a)(5)(ii)(A); 52 Fed. Reg. 10224 (1987)), is therefore necessary to the present operation of these worksharing agreements. It allows the agencies and the EEOC to work harmoniously towards an expeditious and fair resolution of discrimination charges, without wasteful delay or duplication of effort and also without requiring either sovereign to abdicate their statutory responsibilities.[27]

[27] Because the CCRD informed the EEOC within the 300-day limitations period that it did not intend to process the charge initially, this case does not raise the issue whether such formal notice is necessary where, as in this case, the state agency has previously announced to the EEOC in a worksharing agreement the agency's intention to waive its right initially to process a certain type of charge. Pursuant to its procedural regulations, the EEOC forwards copies of

Worksharing agreements therefore are not, as the court of appeals claims (Pet. App. 13a), simply "a means of circumventing the clear statutory framework and Congressional intent requiring deferral to state agencies." Nor, contrary to respondent's sugtion (Br. in Opp. 12), do they constitute a "sleight-of-hand, paper shuffling procedure" to evade the requirements of Title VII. Those agreements are a "method of cooperation which has evolved as the practical solution to the concurrent jurisdiction given by Title VII." *Isaac* v. *Harvard University*, 769 F.2d at 824. They represent precisely the sort of cooperative federalism Congress hoped to encourage in Title VII when it included Section 706(c)'s deferral requirement. Cf. *New York Gaslight Club, Inc.* v. *Carey*, 447 U.S. at 64 n.4 (approving worksharing agreements as a means to "facilitate the processing of complaints"). Respondent's proposed construction

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charges to the state or local agency even where the state agency has previously waived initial processing under a worksharing agreement (29 C.F.R. 1601.13(a)(4)(iii); see 52 Fed. Reg. 10224 (1987)). For the purpose of meeting federal filing deadlines, the EEOC's procedural regulations provide that "[w]here the document on its face constitutes a charge within a category of charges over which the [state] [a]gency has waived its rights to the period of exclusive processing referred to in paragraph (a)(4)(iii) of this section, the charge is deemed to be filed with the Commission upon receipt of the document. Such filing is timely if the charge is received within 300 days from the date of the alleged violation" (29 C.F.R. 1601.13(a)(5)(ii)(A); see 52 Fed. Reg. 10224 (1987)).

of Section 706(c) would jeopardize the operation of these agreements.[28]

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[28] This Court's treatment of somewhat analogous issues lends further support to the EEOC's position in this case. In *Idlewild Liquor Corp.* v. *Epstein*, 370 U.S. 713 (1962) (per curiam), this Court considered the finality, for the purposes of appeal under 28 U.S.C. 1291, of a district court decision not to convene a three-judge court in a federal suit challenging the constitutionality of a state statute. The district court had instead stayed the federal action pending state court proceedings, pursuant to *Pullman* abstention (*Railroad Comm'n* v. *Pullman Co.*, 312 U.S. 496 (1941)). This Court held that the order was a final decision, within the meaning of 28 U.S.C. 1291, because the " '[a]ppellant was effectively out of court' " (370 U.S. at 715 n.2 (quoting *Idlewild Bon Voyage Liquor Corp.* v. *Rohan*, 289 F.2d 426, 428) (2d Cir. 1961)). As more recently described by this Court, that "[a] district court stay pursuant to *Pullman* abstention is entered with the expectation that the federal litigation will resume in the event that the plaintiff does not obtain relief in state court on state-law grounds" does not negate the finality of that district court stay and the appropriateness of immediate appeal. See *Moses H. Cone Memorial Hospital* v. *Mercury Constr. Corp.*, 460 U.S. 1, 10 (1983) (footnote omitted). Indeed, this Court characterized (*id.* at 11 n.11, 12) the deferral in *Idlewild* as a "surrender [of] jurisdiction," even though the district court retained jurisdiction over the case. The complainant in this case is similarly " 'effectively out of' [the state forum]" (460 U.S. at 11 n.11 (citation omitted)). By analogy, therefore, that the state agency, like the federal court in *Idlewild*, formally retained some residual jurisdiction to act following the EEOC's determination should neither negate the finality of the state agency's determination—for the purpose of determining whether its "proceedings" are thereby "terminated"—nor cast doubt on the appropriateness of the EEOC immediately processing the charge.

CONCLUSION

The judgment of the court of appeals should be reversed.

Respectfully submitted.

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RESPONDENT'S

BRIEF

No. 86-1696

IN THE
Supreme Court of the United States
OCTOBER TERM, 1987

EQUAL EMPLOYMENT OPPORTUNITY COMMISSION,
Petitioner,

v.

COMMERCIAL OFFICE PRODUCTS COMPANY,
Respondent.

On Writ of Certiorari to the United States Court of Appeals For the Tenth Circuit

BRIEF FOR THE RESPONDENT

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QUESTIONS PRESENTED

1. Whether a state agency's advance agreement to defer initial processing of a discrimination charge to the Equal Employment Opportunity Commission ("EEOC"), constitutes a "terminat[ion]" of state proceedings within the meaning of Section 706(c) of Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e-5(c), so that the EEOC may immediately upon receipt deem the charge as filed, even though 60 days do not first elapse and even though the state agency retains all of its authority to act upon the charge in the future and indicates its intent to do so.

2. Whether a complainant who has failed to file a charge of employment discrimination with a state agency within the state period of limitations is entitled to the extended 300-day filing period of Section 706(e) of Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e-5(e)

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Table of Authorities Continued

Table of Authorities Continued

IN THE

Supreme Court of the United States

OCTOBER TERM, 1987

No. 86-1696

EQUAL EMPLOYMENT OPPORTUNITY COMMISSION,
Petitioner,

v.

COMMERCIAL OFFICE PRODUCTS COMPANY,
Respondent.

**On Writ of Certiorari to the
United States Court of Appeals
For the Tenth Circuit**

BRIEF FOR THE RESPONDENT

STATEMENT OF THE CASE

This case concerns the timeliness of a charge of discrimination under Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e, *et seq.* ("Title VII").

On March 26, 1984, Ms. Suanne L. Leerssen submitted a charge of discrimination to the Equal Employment Opportunity Commission ("EEOC"), alleging that on June 10, 1983, 290 days earlier, Respondent,

Commercial Office Products Company[1] ("Commercial"), discharged her from its employment because of her sex (Pet. App. 25a). The EEOC forwarded a copy of Ms. Leerssen's charge to the Colorado Civil Rights Division ("CCRD")[2] on March 30, 1984, together with a Charge Transmittal (Pet. App. 26a). The CCRD's date stamp shows it received those documents on April 3, 1984 (Pet. App. 27a).

Section 706(c) of Title VII, 42 U.S.C. § 2000e-5(c), (App., *infra*, 1a) provides that in a state with laws prohibiting the alleged unlawful employment practice and establishing an agency with authority to grant or seek relief from such practice, no charge may be filed with the EEOC "before the expiration of sixty days after proceedings have been commenced under the State or local law, unless such proceedings have been earlier terminated . . . ." Rather than wait for 60 days to elapse or for the CCRD to terminate its proceedings, the EEOC immediately commenced its investigation on the same day it received the charge, March 26, 1984.[3] The EEOC did so apparently for two reasons.

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[1] Commercial Office Products Company is a corporation, and its parent, subsidiary, and/or affiliate companies are identified in its Brief in Opposition, at 1.

[2] The discharge occurred in Colorado, which has laws prohibiting employers from discharging employees because of their sex, C.R.S. § 24-34-401, *et seq.*, and establishing a state fair employment practices agency, the CCRD, with authority to grant or seek relief from any such practice. C.R.S. § 24-34-301, *et seq.* The CCRD operates under the direction of the Colorado Civil Rights Commission ("CCRC"). The term "CCRD" herein refers to both the Division and the Commission.

[3] This was the date given by the EEOC to the District Court

First, an applicable EEOC regulation provided that deferral to the state agency was not necessary because the charge was untimely under state law. The EEOC stated in one of its briefs to the District Court (R. 113, *see also* R. 72) that the EEOC sent the charge to the CCRD pursuant to that regulation, 29 C.F.R. § 1601.13(a)(3) (1986), which provides:[4]

> (3) Charges arising in jurisdictions having a 706 Agency but which charges are apparently untimely under the applicable state or local statute of limitations are filed with the Commission upon receipt. Such charges are timely filed if received by the Commission within 300 days from the date of the alleged violation. Copies of all such charges will be forwarded to the appropriate 706 Agency.

The second apparent reason for the EEOC's immediate investigation of the charge is found in the provisions of a worksharing agreement previously entered into between the EEOC and the CCRD (Pet. App. 45a-54a). Paragraphs 8 and 9 of the worksharing agreement essentially provide, with some exceptions, that the EEOC will process charges initially submitted

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(Pet. App. 34a) and accepted by the Tenth Circuit (Pet. App. 2a). At page 4 of its brief to the Court of Appeals, however, the EEOC claimed that it did not commence its investigation until April, 1984.

[4] The Tenth Circuit concluded that this regulation conflicts with Title VII (Pet. App. 6a-7a). As noted by the EEOC (Reply Memo. 5, n.4), this regulation, under which the EEOC proceeded in this case, was deleted on March 31, 1987. 52 Fed. Reg. 10224 (1987). The 1986 version of 29 C.F.R. § 1601.13(a), reproduced *infra*, App. 3a-7a, is virtually identical to the version in effect when Ms. Leerssen filed her charge.

to the EEOC, and the CCRD will process charges initially submitted to the CCRD. Paragraph 5 provides that all charges which are to be processed by the EEOC pursuant to paragraph 9 will not be acted upon by the CCRD until after the EEOC has resolved the charge (Pet. App. 47a).

As noted by the Tenth Circuit (Pet. App. 14a), the EEOC instructed the CCRD in the Charge Transmittal that the EEOC intended to process the charge initially (Pet. App. 26a). On April 4, 1984, the day after receiving the Charge Transmittal, the CCRD completed the lower portion of that form. A comparison of this version of the Charge Transmittal (Pet. App. 27a) with the version sent by the EEOC to the CCRD (Pet. App. 26a), reveals which agency completed which portions. The CCRD checked a box which indicated the CCRD's "intention not to initially process the charge," rather than an alternative box which would have indicated the CCRD's "intention to dismiss/close/not docket the charge . . . ."

On April 4, 1984, the CCRD also sent Ms. Leerssen a letter (Pet. App. 28a-29a) which informed her of the following facts:

1. The EEOC forwarded a copy of Ms. Leerssen's charge to the CCRD, which assigned it a CCRD charge number;

2. The CCRD would not take any action on Ms. Leerssen's charge until after the EEOC terminated its proceedings;

3. The CCRD might adopt the final findings and order of the EEOC;

4. Final action on her charge must be taken by the CCRD within 180 days of the filing of her charge;

5. Ms. Leerssen could request up to a 90-day extension of time; and

6. It was essential for Ms. Leerssen to cooperate with the CCRD concerning the charge and to keep the CCRD informed of any change in address or phone number.

Believing Ms. Leerssen's charge to be untimely, Commercial declined to answer an extensive EEOC questionnaire and exhausted all administrative procedures for contesting the EEOC's subsequent administrative subpoena. The EEOC then petitioned the United States District Court for the District of Colorado to enforce its subpoena. In response, Commercial argued that the subpoena should not be enforced because the charge was untimely. Commercial primarily argued that the charge was untimely under *Mohasco Corp. v. Silver*, 447 U.S. 807 (1980), and *Klausner v. Southern Oil Co.*, 533 F. Supp. 1335 (N.D.N.Y. 1982), since the CCRD had not terminated its proceedings within 60 days nor before expiration of 300 days from the date of the alleged discriminatory act. Thus, pursuant to Section 706(c), the charge could not have been filed with the EEOC until at least the 350th day (290 plus 60), which is beyond even the extended 300-day filing period identified in Section 706(e) of Title VII, 42 U.S.C. § 2000e-5(e) (App., *infra*, 2a). Commercial also argued, in all of its briefs during all proceedings below, that Title VII's extended 300-day filing period did not apply because the charge was untimely under Colorado law.

Judge Kane agreed with Commercial's principal argument and, ruling from the bench at a hearing held on June 6, 1985, stated simply, "I think *Klausner* is persuasive. The petition to enforce the subpoena is

denied. We'll be in recess." (J.A. 19). Judge Kane did not make any express findings of fact. The facts are not in dispute, however, except on two points.

First, the EEOC claims (EEOC Br. 5) that the CCRD returned the Charge Transmittal to the EEOC. Commercial claims this was not the case. The EEOC submitted with its petition to the District Court an affidavit by its District Director which claimed in paragraph 6 (R. 21) that a copy of the Charge Transmittal, as sent by the CCRD to the EEOC, was attached to the petition as Exhibit 2. Exhibit 2 to the petition (R. 25), however, was merely the Charge Transmittal as completed by the EEOC; the lower portion had not been completed by the CCRD.[5]

Second, the EEOC claims that the CCRD orally waived its charge processing rights by telephone (EEOC Br. 5 n.3). Commercial disagrees. In support of its claim the EEOC cites Pet. App. 38a-39a, which set forth the unsubstantiated statement by the EEOC's District Director that the CCRD orally waived jurisdiction over this charge on March 26, 1984. As noted, however, the CCRD did not even receive the charge until April 3, 1984. Further, the CCRD's complete file contains no record whatsoever of any such telephone call, even though it does contain a record of so minor a matter as a message from Commercial's attorneys asking for a copy of the

[5] Further, the EEOC informed counsel for Commercial in 1985 that the EEOC's file did not contain a copy of the Charge Transmittal with the lower portion completed by the CCRD. The record contains no formal evidence of this admission by the EEOC, but neither does the record contain any evidence of the EEOC's contrary assertions at p.5 n.3 of its brief.

Charge Transmittal[6] (*see* paragraph 5 of Medina affidavit, J.A. 9).

Commercial noted in its brief to the District Court (R. 62), filed eight days before the hearing, that the EEOC's file did not contain the Charge Transmittal completed by the CCRD. The EEOC nonetheless failed to present any evidence whatsoever to the District Court that it had ever received written or verbal notice from the CCRD purporting to authorize the EEOC to process Ms. Leerssen's charge, and the record before this Court contains no such evidence.[7]

After Judge Kane's ruling of June 6, 1985, the EEOC filed a motion to alter or amend judgment, together with a letter from the CCRD to Ms. Leerssen dated June 14, 1985,[8] stating that the CCRD never had jurisdiction over her charge. This letter was the very first indication by the CCRD of termination of its proceedings with respect to Ms. Leerssen's charge. Judge Kane denied the EEOC's motion.

On appeal to the Court of Appeals for the Tenth Circuit, Judge Kane's decision was affirmed, and the EEOC's subsequent petition for rehearing was denied.

[6] Commercial did obtain a copy of the fully completed Charge Transmittal from the CCRD, together with an affidavit of authenticity, and filed both documents with the District Court (R. 94-95). That is the probable source of the fully completed document reproduced in the EEOC's Petition (Pet. App. 27a).

[7] The statement by the Court of Appeals that the CCRD returned the Charge Transmittal to the EEOC (Pet. App. 2a) was apparently made in reliance on the EEOC's statement of facts, and without any evidentiary support.

[8] The letter's terms are reproduced at Pet. App. 55a-56a, but with the erroneous date of June 14, 1984 (see Reply Memo 4 n.2).

SUMMARY OF ARGUMENT

Congress has determined 180 days to be the generally appropriate limitation period for filing charges of employment discrimination under Title VII. Section 706(e), 42 U.S.C. § 2000e-5(e) (App., *infra*, 2a). Without question, Ms. Leerssen failed to "exercise the diligence required by that general rule." *Cf. Mohasco*, 447 U.S. at 815. Congress also imposed a significant prerequisite to the filing of a Title VII charge in states which have laws prohibiting the alleged unlawful employment practice and establishing a state agency "with authority to grant or seek relief from such practice. . . ." In such states (commonly called "deferral states"), no Title VII charge may be filed with the EEOC until state proceedings have been commenced and an additional 60 days (120 days during the first year after the effective date of the state law) have elapsed, unless the state proceedings are earlier terminated. Section 706(c), 42 U.S.C. § 2000e-5(c) (App., *infra*, 1a). To accomplish the very particular purpose of avoiding loss of a complainant's federal rights during the period that filing with and action by the EEOC is prohibited, which might last as long as 120 days, Congress created an exception to Title VII's basic 180-day limitation period. Congress extended that period by 120 days in cases to which the mandatory deferral prerequisite of Section 706(c) applies. *See Mohasco*, 447 U.S. at 820.

Commercial submits that Ms. Leerssen's Title VII charge was untimely for two reasons: (1) the basic 180-day limitation period under Title VII applies to this case because the CCRD lacked the "authority to grant or seek relief" which is required by Section 706(e), and Ms. Leerssen unquestionably failed to file

her charge within 180 days; and (2) even assuming arguendo that the extended 300-day filing period applies to this case, Ms. Leerssen's charge, though received by the EEOC on the 290th day, was not "filed" with the EEOC until well beyond the 300th day. Because the EEOC's petition and brief are directed only to the second of these arguments, Commercial will address that argument first.

Assuming arguendo that Title VII's extended 300-day filing period applies to this case, the charge was still untimely. Under this Court's holding in *Mohasco*, the charge, although received by the EEOC on the 290th day, could not have been "filed" with the EEOC until it had first been filed with the CCRD and then 60 days elapsed, unless the CCRD earlier "terminated" its proceedings. The CCRD did not earlier terminate its proceedings, so the charge could not have been filed with the EEOC until the 350th day (290 + 60 = 350) at the earliest.

In *Mohasco*, the EEOC argued that a charge may be immediately filed with the EEOC upon receipt (prior to deferral to the state agency) and that "Section 706(c) is only a prohibition against the EEOC's taking any action on the charge during the 60-day deferral period." (Amici curiae brief of United States and EEOC, No. 79-616, at 14). This Court rejected the EEOC's argument. Notwithstanding *Mohasco*, the EEOC now essentially argues both that Ms. Leerssen's charge was "filed" with the EEOC upon receipt and that the EEOC could immediately take action on the charge, even though the charge was not first deferred to the CCRD. The EEOC's position is based

upon the CCRD's advance waiver of initial processing in the worksharing agreement.[9]

Where a state agency has authority to grant or seek relief, however, the EEOC must defer to the state agency for the full 60 days, unless the state proceedings are earlier "terminated." Section 706(c). Contrary to the EEOC's argument, the word "terminated" is not ambiguous; it clearly means "completed" or "ended." A "temporary cessation" does not constitute termination. Here, the CCRD unquestionably did not complete or end its proceedings prior to expiration of both the 60-day deferral and 300-day filing periods. Nor did the CCRD have the power to authorize the EEOC to proceed prior to the passage of 60 days or termination of CCRD proceedings. The charge was therefore untimely under Section 706(e).

The legislative history and other provisions of Title VII support the decision of the Tenth Circuit, not the EEOC's position. In particular, Senator Dirksen's comments conclusively establish that the mandatory deferral provisions of Section 706(c) were designed to *prevent*, not encourage, "cooperative" agreements be-

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[9] The EEOC also argues that it received a specific waiver from the CCRD with respect to Ms. Leerssen's charge, *i.e.*, the completed Charge Transmittal and/or an oral waiver by telephone, which constituted termination of state proceedings previously commenced. As discussed at pages 6-7 above, the record offers no support for these allegations. The EEOC's position that even a charge which is timely under state law may be immediately filed with and acted upon by the EEOC where an advance waiver by the state agency applies also finds expression in its regulations. 29 C.F.R. § 1601.13(a)(5)(ii)(A) (1986) (App., *infra*, 6a) and § 1601.13(d) (1986). Section 1601.13(a)(5) was recently redesignated as subparagraph (a)(4), and its language was changed slightly. 52 Fed. Reg. 10224 (1987).

tween the EEOC and state agencies which might evade the Congressional preference for state rather than federal enforcement of fair employment laws.

Even assuming arguendo that Ms. Leerssen's charge was filed with the EEOC immediately upon receipt and prior to any deferral to the CCRD, the charge was nonetheless untimely because Title VII's extended 300-day filing period does not apply in this case. The 300-day period applies only where proceedings are initially instituted with a state or local agency with "authority to grant or seek relief from such practice . . . ." Section 706(e). The CCRD lacked that authority to grant or seek relief with respect to Ms. Leerssen's charge, because the charge was untimely under Colorado's six-month period of limitations. Further, where the EEOC takes action immediately and prior to deferral to the state agency in such cases, as it did here pursuant to 29 C.F.R. § 1601.13(a)(3) (1986), there is no reason to apply the extended 300-day filing period, which was intended only to avoid loss of federal rights while the EEOC is prohibited from acting.

Commercial respectfully submits that the EEOC cannot lawfully avoid the mandatory deferral requirements of Section 706(c) and consider the charge to be "filed" upon receipt merely by entering into a contractual arrangement with the CCRD. Even if the EEOC could lawfully do so, however, it cannot *both* avoid the deferral requirements of Section 706(c) *and* obtain the benefits of the extended 300-day filing period under Section 706(e). The extended filing period was intended only for cases where deferral by the EEOC is required under Section 706(c).

ARGUMENT

I. EVEN IF THE EXTENDED 300-DAY FILING PERIOD APPLIES, THE CHARGE WAS UNTIMELY FILED WITH THE EEOC.

Even assuming arguendo that Title VII's extended 300-day filing period applies in this case, the judgment below should be affirmed, because the charge was not filed with the EEOC within 300 days. Under *Mohasco*, the EEOC's *receipt* of the charge on the 290th day did not constitute *filing* under Section 706(e) unless there was first compliance with the mandatory deferral requirements of Section 706(c). *See*, 447 U.S. at 817. If the full 60-day deferral period applied, the charge could not have been filed with the EEOC until the 350th day at the earliest, well beyond even the extended 300-day filing period under Title VII. The only exception to mandatory deferral for the full 60 days is where the state agency earlier terminates its proceedings. Section 706(c).

There can be no dispute in this case that the CCRD did not, prior to the expiration of the 60-day deferral period, complete or end all of its proceedings with respect to Ms. Leerssen's charge. Rather, at all relevant times[10] the CCRD retained all of its rights to act on the charge in the future and indicated its intent to do so, as evidenced by its selection of the second rather than third option on the Charge Transmittal (Pet. App. 27a), its letter to Ms. Leerssen (Pet. App.

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[10] Only after the District Court's decision below did the CCRD state that it never had jurisdiction over Ms. Leerssen's charge (*see supra* note 8 and accompanying text). That letter, dated June 4, 1985, was written far more than 300 days after the alleged discriminatory act of which Ms. Leerssen complained.

28a), and paragraph 5 of the worksharing agreement (Pet. App. 47a), which provides that the CCRD will review the EEOC's resolution, in accordance with the CCRD's statute, rules and regulations. The District Court's dismissal of the EEOC's petition in reliance on *Klausner* (J.A. 19) indicates that the court found the CCRD's proceedings not to have been completed in time to allow filing of the Title VII charge within 300 days. That factual conclusion, with which the Tenth Circuit agreed (Pet. App. 16a), is totally correct, and certainly not clearly erroneous.[11]

The EEOC argues, however, that the word "terminated" as used in Section 706(c) is ambiguous and as a matter of law may mean only a "temporary cessation" (EEOC Br. 15).[12] The EEOC also argues

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[11] *Cf.* F.R. Civ. P. 52(a).

[12] The EEOC also claims that the word "proceedings" is ambiguous in the context of the statutory language that "no charge may be filed [with the EEOC] . . . before the expiration of sixty days after proceedings have been commenced under the State or local law, unless *such proceedings* have been earlier terminated . . ." [emphasis added] Section 706(e). The EEOC asserts that the word "proceedings" may mean only initial proceedings and that the modifier "such" refers to those proceedings already "commenced" under state or local law (EEOC Br. 14-15). There is no reason, however, to read "such" as referring to anything more particular than "proceedings . . . under the State or local law." Further, the EEOC's position that each element of state proceedings may constitute its own independent "proceeding" leads inescapably to the conclusion that the initial "proceeding", the filing of a charge with the state agency (which under Section 706(c) is deemed sufficient to commence the required state action), will always be completed simultaneously with its commencement, since receipt of the charge by the agency both initiates and completes filing. The 60-day deferral language of Section 706(c) would therefore never be applied and would be

that the CCRD's waiver of initial processing should be deemed sufficient to satisfy the purpose of Title VII's mandatory deferral requirement. The EEOC is mistaken on both counts, since its position is contradicted by the literal language of Section 706, this Court's opinion in *Mohasco*, the EEOC's own regulations and prior statements to this Court, other provisions of Title VII, the United States Constitution, Colorado law, and the legislative history of Title VII.

A. The CCRD did not Terminate its Proceedings Prior to Expiration of the 60-Day Mandatory Deferral Period.

As this Court stated when interpreting the deferral provisions of Section 706 in *Mohasco*, "*the words of the statute are not ambiguous.*" [emphasis added] 447 U.S. at 818. Thus, the word "terminated" should be given its plain and ordinary meaning, "completed" or "ended."

Although the meaning of the word "terminated" was not an issue in *Mohasco*, the plain and ordinary meaning of that word is demonstrated by the three occasions in that opinion where the Court used synonyms for "terminated": "*ended*" [emphasis added] 447 U.S. at 816; "*completed*" [emphasis added] 447 U.S. at 821; and "*happens to complete*" [emphasis added] 447 U.S. at 814, n.16. The unambiguous meaning of "terminated" is also apparent from the EEOC's use of the synonyms "completed" and "concluded" in the amici curiae brief filed by the EEOC and the United States in *Mohasco*. (Case No. 79-616, EEOC Br. 16, 18).

totally superfluous. The Tenth Circuit appropriately rejected the EEOC's strained interpretation of "proceedings" as circular and unwarranted by the legislative history of Title VII (Pet. App. 9a n.7).

The EEOC argues that its interpretation of "terminate" is entitled to "great deference". As this Court stated in *Mohasco*, however, the EEOC's "'interpretation' of the statute cannot supersede the language chosen by Congress." 447 U.S. at 825. Further, the EEOC's own regulations state that a charge is deemed filed on the date the state agency "terminated its proceedings *or* . . . waived its right to exclusive processing of the charge." [emphasis added]. 29 C.F.R. § 1601.13(a)(5)(ii)(B) (1986) (App., *infra*, 7a). *See also* subparagraphs (b)(1) and (2)(iii). If waiver of initial processing equated with termination, the EEOC would not need to use both terms and the disjunctive "or."

The Tenth Circuit properly rejected the EEOC's claim that "terminated" is ambiguous:

> The plain and ordinary meaning of "terminate" involves the end or completion of an activity. [footnote omitted] We find it difficult to understand how this meaning could in any way be controversial. [footnote omitted]

(Pet. App. 8a-9a) The Tenth Circuit noted the First Circuit's contrary statements in *Isaac v. Harvard University*, 769 F.2d 817 (1st Cir. 1985), but concluded that the First Circuit's definition of "terminate" (as being a "temporary cessation") was a "strained reading" of the word (Pet. App. 9a, n.6).

In *Isaac*, the state agency indicated on the transmittal form that it "will not process this charge per agreement [with] EEOC."[13] The state agency appar-

[13] The terms of the applicable agreement were not before the First Circuit, so the court could only speculate as to its contents.

ently took no other action whatsoever until more than two years later, after the EEOC had completed its investigation and made a finding of reasonable cause on behalf of the charging party. Under those facts, the result in *Isaac* perhaps makes sense (although not for the reason advanced by the First Circuit, that "terminate" merely means "suspend"). If a state agency in fact *terminates* its proceedings, without expressing any intent whatsoever to further process the charge (completely unlike this case), the fact that the state agency might several years later inexplicably choose to reactivate the charge should not necessarily negate all that has occurred in reliance upon the state's termination of its proceedings. Indeed, the First Circuit expressly stated that of particular importance to its conclusion was the fact that Isaac's charge had been fully processed and investigated by the EEOC. 769 F.2d at 817.

Failure to apply the common, ordinary, and unambiguous meaning of "terminate" to Section 706(c) may only trigger a new wave of litigation with complainants arguing that any evidence of state agency delay or inaction, no matter how far short of completion, is sufficient. Congress gave "meticulous attention" to this language,[14] and could easily have been more precise if it meant "suspend" instead of "terminate." Because the statute is not ambiguous, and because the CCRD did not "happen to complete"[15] its proceedings before the 60-day deferral and 300-day filing periods had expired, the judgment below should be affirmed.

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[14] *See infra* p. 24.

[15] *Cf. Mohasco*, 447 U.S. at 814 n. 16.

B. The CCRD Cannot Waive Title VII's Prohibition Against the Filing of Charges with the EEOC Where the Mandatory Deferral Requirements are not Met.

The EEOC argues that Section 706(c) was intended solely to give state agencies an opportunity to initially process charges, and that the Court should not prevent the CCRD from choosing to waive *its* rights to the 60-day period of exclusive jurisdiction. As this Court recognized in *Mohasco*, however, Section 706(c) is a statutory prohibition directed toward the EEOC: "Thus, in terms, the statute prohibited the EEOC from allowing the charge to be filed on the date the letter was received." 447 U.S. at 817. The statute does not, in terms, grant or confer rights upon the state agencies. The EEOC therefore misstates the issue. The question is not whether the CCRD may waive its rights, but rather whether the CCRD possesses the power to authorize the EEOC to act in the face of a federal statute expressly prohibiting the EEOC from acting. Under the Supremacy Clause of the United States Constitution, the CCRD clearly lacks that power. U.S. Const. art. VI.

Even if the EEOC's interpretation of the Congressional purpose behind Section 706(c) were correct, which Commercial denies, the EEOC nonetheless confuses the *purpose* behind the statute with the *means* adopted by Congress to achieve its purpose. Congress believed its purpose could best be achieved through enacting into law the language of Section 706(c). If the EEOC and the CCRD now believe that the Congressional purpose can be met without fulfilling the literal requirements of that law, they should direct their arguments to Congress, rather than seek a

strained judicial interpretation which essentially disregards the words chosen by Congress.

Strained judicial statutory interpretation, such as occurred in *Isaac*, is particularly inappropriate in this context, where a compromise of countervailing interests was necessary to end one of the longest filibusters in the history of the Senate. *Mohasco*, 447 U.S. at 819-20. As stated by this Court:

> It must also be recognized, however, in light of the tempestuous legislative proceedings that produced the Act, that the ultimate product reflects other, perhaps countervailing, purposes that some Members of Congress sought to achieve. The present language was clearly the result of a compromise. It is our task to give effect to the statute as enacted.

Mohasco, 447 U.S. at 818-19.

Even assuming arguendo that a state agency could "waive its rights" and thereby allow the EEOC to proceed immediately, Commercial submits that the CCRD's advance agreement in the worksharing agreement that it would not initially process charges which are first submitted to the EEOC is void under Colorado law. The EEOC therefore never received valid authorization to proceed from the CCRD.[16] Colorado

[16] To the extent that the EEOC may seek to rely upon any individualized waiver by the CCRD of initial processing rights with respect to Ms. Leerssen's charge as a basis for the EEOC to proceed immediately, the EEOC bore the burden of proving to the District Court that it had received notice of such authorization. This the EEOC failed to do. *See supra* pp. 6-7. In any event, the EEOC began to investigate before giving the CCRD any opportunity to act on the charge.

law mandates that the CCRD shall take action on a charge "promptly," "[i]mmediately," and within specific time limitations. C.R.S. § 24-34-306(2) and (11) (App., *infra*, 8a-9a). In direct abdication of these statutory responsibilities, the CCRD agreed in the worksharing agreement (Pet. App. 45a-54a) that it would not act upon any charge falling within paragraph 9 of the agreement (such as the charge in this case) until the EEOC had resolved the charge.

The agreement by the CCRD is an "agency statement of general applicability and future effect . . . setting forth the procedure . . . of [the] agency," and therefore it constitutes a "rule" as defined in Colorado's State Administrative Procedure Act, C.R.S. § 24-4-102(15) (App., *infra*, 7a). Because that rule conflicts with the CCRD's specific statutory obligations discussed above, it is void pursuant to the terms of C.R.S. § 24-4-103(8)(a) (App., *infra*, 7a-8a), which states in pertinent part, "Any rule . . . which conflicts with a statute shall be void." In short, even if state agencies could "waive" the requirements of Section 706(c), which Commercial denies, the EEOC never received from the CCRD a waiver which was valid under Colorado law.

Finally, the EEOC's argument that the CCRD may, in its sole and unfettered discretion, waive initial processing rights ignores the interests of employers in having such matters resolved at the local level under local procedures. As Senator Cotton stated:

> It is a far cry—and everyone knows it—between having enforcement by a commission in his own state, with investigators in his own county, who know the people and know

> the situation, and having Federal bureaucrats from Washington telling the small business people of America whom they shall employ.

110 Cong. Rec. 12826 (1964). *See also* 110 Cong. Rec. 13086 (additional remarks of Senator Cotton).

Since the CCRD lacked the power to authorize the EEOC to accept Ms. Leerssen's charge for filing purposes before the 60-day mandatory deferral period had expired and before termination of CCRD proceedings, the charge was not filed within the extended 300-day filing period, and the judgment below should be affirmed.

C. The Legislative History and Other Provisions of Title VII Demonstrate that the EEOC Failed to Comply with the Mandatory Deferral Requirements of Title VII.

If the Court agrees that the word "terminated" as used in Section 706(c) is unambiguous, the legislative history of Title VII need not be considered. "Resort to legislative history is only justified where the face of the Act is *inescapably ambiguous* . . . ." [emphasis added]. *Garcia v. United States*, 469 U.S. 70, 76 n.3 (1984) (quoting *Schwegmann Bros. v. Calvert Distillers Corp.*, 341 U.S. 384, 395 (1951) (Jackson, J., concurring)). If considered, however, the legislative history supports Commercial's position that the work-sharing agreement between the EEOC and the CCRD seeks to evade, rather than fulfill, the Congressional intent in enacting Section 706(c) and (e).

The version of the civil rights bill initially passed by the House directed the EEOC to enter into agreements with state agencies which would effectively prohibit enforcement of the federal law, provided the EEOC determines that the state agency possesses and

effectively exercises the power to eliminate discrimination in employment.[17] As noted by the EEOC (EEOC Br. 17-18), this provision was criticized by Senator Dirksen and others *not* because it too completely removed the EEOC from enforcing federal law in such states, but rather because it gave the EEOC too much discretion to avoid such deferral. As also recognized by the EEOC (EEOC Br. 18-19), it became necessary to address those concerns in order to end the ongoing filibuster. The Dirksen compromise, which contained the essential provisions of what are now Sections 706(c) and 706(e), resolved the impasse.

Senator Dirksen expressly recognized, however, that to merely require cooperation between the state and federal agencies was *not* sufficient:

> Cooperation, however, between the Federal Commission on the one hand and the State and local commissions on the other can easily become a one-way street because of the pressure and emotionalism involved and because of the tendency of Federal agencies to dominate any field which they are authorized by Congress to enter.

110 Cong. Rec. p. 8193 (1964). This statement constitutes the single most important piece of legislative history in this case, because it was the introductory statement of intent regarding the new deferral provisions, because it demonstrated that those provisions were intended to prevent federal dominance, because it was made by perhaps the chief architect of the compromise which enabled passage of Title VII, and

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[17] H.R. 7152, 88th Cong. 2nd Sess., 110 Cong. Rec. 2511-2512, 12598 (1964).

because it directly refutes the EEOC's position that Congress sought to encourage or even allow any and all "cooperative" arrangements between the EEOC and state agencies. Senator Dirksen clearly foresaw that, *unless prevented by Congress*, the EEOC would likely come to exert its power so as to dominate the field through "cooperative" arrangements with state and local agencies, such as those arrangements which are now set forth in the worksharing agreements between the EEOC and over 95% of the designated state deferral agencies.[18]

Congress recognized that there might be innumerable factual variations of ineffective state enforcement and that it was impossible to devise a formula which would both allow the EEOC to proceed immediately in all of those instances and also prevent the EEOC from proceeding in all cases where state enforcement is effective.[19] Because Senator Dirksen and others objected to the House bill's grant of discretion to the EEOC to deal with each particular situation on its facts, however, Congress solved the problem with a two-pronged approach to federal deferral which was totally objective, albeit somewhat inflexible.

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[18] The EEOC states that it has worksharing agreements with 43 states, and that the agreements typically provide that the EEOC will process certain categories of charges, with the deferral agency "waiving its rights to the 60-day exclusive processing period" in such instances (EEOC Br. 4, 30-31). There are now 44 states with designated state deferral agencies. 29 C.F.R. § 1601.74 (1986).

[19] "Congress cannot determine nor can we devise a formula for determining which State laws and procedures are adequate." 110 Cong. Rec. 6550 (1964) (remarks of Senator Humphrey).

First, Congress restricted federal enforcement in states with laws and agencies capable of combatting employment discrimination. In such states, a charge cannot be filed with the EEOC until after state proceedings are commenced and the state agency is given sufficient time to resolve the problem. Congress limited this mandatory deferral period to 60 days (120 days during the first year of the state law). It is important to recognize, as did the Tenth Circuit below (Pet. App. 11a) and this Court in *Mohasco*, 447 U.S. at 821 n.34, that 60 days were then considered more than sufficient time for the state agency to complete its proceedings. Thus, Section 706(c) would effectively remove any need for EEOC action in most cases.[20] If the state action were ineffective for any reason, however, the EEOC would be free to proceed after waiting the relatively short[21] period of 60 days (or 120 days during the first year of the state law).[22]

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[20] Given the original Congressional intent, the fact that state proceedings may now routinely take more than 60 days, as noted by the State of Colorado and the other amici States at page 4 of their brief, is more logically grounds to seek Congressional enlargement of the mandatory 60 day deferral period, rather than judicial intervention to effectively eliminate mandatory deferral.

[21] The EEOC's protestations with respect to a possible 60-day delay are somewhat curious in light of its delay of over *five months* in ruling on Commercial's Appeal of Determination on Petition to Revoke or Modify Subpoena. Commercial's appeal (R. 82-88) was served on October 15, 1984. The EEOC's Determination (R. 89-90) was dated March 18, 1985. *Cf.* 29 C.F.R. § 1601.16(b) (1986).

[22] To insure that federal rights would not be lost while the complainant was pursuing what might well be an ineffective state remedy, the federal filing period was extended by 120 days

Second, the Dirksen compromise carefully and deliberately[23] provided one very limited, specific, and objective exception to the mandatory 60-day deferral period: only where the state agency has "*terminated*" its proceedings, so that there apparently remains no possibility whatsoever[24] that the state agency will act further, may the EEOC proceed before the end of the 60-day period. Although such a 60-day deferral might in some other cases appear inefficient, passage of Title VII required a compromise which favored federal deferral over absolute efficiency in all cases; any attempt to create further exceptions to the 60-day deferral requirement would only invite the same abuses which Congress had feared would result from the original House-passed bill. Accordingly, this amended deferral scheme was chosen by Congress as the best means for meeting the dual Congressional goals,[25] given the impossibility of devising any formula

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in those situations. The basic filing period as originally enacted was 90 days, with an extended 210-day filing period where the mandatory deferral requirements are met. Those periods were enlarged in 1972 and are now 180 days and 300 days, respectively.

[23] As noted by the EEOC (EEOC Br. pp.25-26), the wording of the amended deferral provisions received "meticulous attention," and the drafters were "mindful of every word, of every comma, and of the shading of every phrase" 110 Cong. Rec. 11935 (1964) (remarks of Senator Dirksen).

[24] *See* remarks of Senator Case that the EEOC must wait 60 days "if there is *possible* reason to believe that a state agency will deal with the matter . . . ." [emphasis added] 110 Cong. Rec. 13090 (1964).

[25] Congress clearly sought to allow federal enforcement where state enforcement is ineffective, but because of the fear of federal domination as expressed by Senator Dirksen, whether

for determining, in all possible situations, whether state laws and procedures are effective.

The EEOC ignores this history and the meticulously chosen language of Section 706(c) when it claims that the mandatory deferral period is purely a states rights provision which can be waived by the state agency for any reason, even if the state agency does intend to take action on the charge at some time. To the contrary, the statute represents the affirmative preference of Congress for state, rather than federal, enforcement:

> Congress intended through § 706(c) to screen from the federal courts those problems of civil rights that could be settled to the satisfaction of the grievant in a "voluntary and localized manner."

Oscar Mayer Co. v. Evans, 441 U.S. 750, 755 (1979). *See also Mohasco*, 447 U.S. at 821, for the proposition that Congress intended "to avoid federal intervention unless its need was demonstrated." The EEOC's position, that state agencies may authorize the EEOC to act immediately even though the state agencies intend to take further action in the future, is contrary to the Congressional intent.

As recognized by the Tenth Circuit (Pet. App. 10a n.10), Senator Humphrey characterized the Senate substitute as a "States responsibilities bill," 110 Cong. Rec. 12725 (1964), *see also* 110 Cong. Rec. 11936 (1964), and he noted that the Senators who worked on the substitute bill "wanted to encourage State and

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through "cooperative" arrangements with state agencies or otherwise, Congress sought to avoid federal enforcement where state enforcement might be effective.

local government action in this area." 110 Cong. Rec. 13082 (1964). Further, Senator Clark noted that federal deferral to effective state enforcement "would be a saving in the Federal budget . . . ." 110 Cong. Rec. 7205 (1964). Congress most definitely was *not* neutral on the issue of state versus federal enforcement; its affirmative preference for state action sounds throughout the legislative history too clearly to question.[26]

Other provisions of Title VII also support Commercial's interpretation of the legislative history and purpose. Most significantly, in what is now Section 706(d), 42 U.S.C. § 2000e-5(d) (App., *infra*, 1a-2a), Congress expressly provided in the case of charges filed by one of the EEOC's Commissioners that deferral to state agencies is required *only upon request by the state agency, and that the state agency may request the deferral period to be shorter than 60 days.* In stark and dramatic contrast, Section 706(c) contains no such language giving state agencies the option to shorten or eliminate the mandatory 60-day deferral period. Given the "meticulous attention" which Congress bestowed on these provisions, this Court should not simply ignore these differences in wording and hold that Section 706(c) means what Section 706(d) says, as the EEOC asserts.[27]

[26] The EEOC's references (EEOC Br. 3, 4, 5, 32) to "concurrent" jurisdiction of the EEOC and state agencies are erroneous. Jurisdiction is sequential. The state agencies have "primary, exclusive jurisdiction" for the first 60 days. 110 Cong. Rec. 13087 (1965) (Remarks of Senator Dirksen). Assuming a charge is timely under state and federal law, jurisdiction can be concurrent only after 60 days elapse without prior termination of state proceedings.

[27] (EEOC Br. 29) The EEOC cites a footnote from *Love v. Pullman*, 404 U.S. 522, 526-27 n.6 (1972). There the Court was addressing whether under both subsections of Section 706 the EEOC could hold a charge in abeyance *during* the deferral period, not whether the state agency could eliminate the deferral period. Nor does the legislative history cited by the EEOC support its claim that the two subsections, though worded so differently, were intended to have identical meanings.

Other provisions of Title VII are also significant. While Section 709(b), 42 U.S.C. § 2000e-8(b) (App., *infra*, 3a), authorizes cooperative agreements between the EEOC and state agencies, it expressly provides that such agreements "may include provisions under which *the Commission shall refrain* from processing a charge in any cases or class of cases specified in such agreement . . . ." [emphasis added] Section 709(b) does *not*, however, expressly authorize the EEOC to agree to the converse, that state agencies will defer to the EEOC.

Moreover, Section 706(b) of Title VII, 42 U.S.C. § 2000e-5(b), sets forth a requirement, which was added in 1972, that the EEOC accord substantial weight to final state determinations. This requirement would be effectively eliminated in many cases to which it might otherwise apply if this Court were to reverse the Congressionally intended priority of state action before federal action.

As this Court held in *Mohasco*, "The statutory plan was not designed to give the worker in a deferral State the option of choosing between his state and federal remedy . . . ." 447 U.S. at 821. Yet that would be the precise effect of adopting the EEOC's position. If the worksharing agreement in this case is given effect, a complainant, merely by choosing whether to direct his charge to the CCRD or to the

EEOC, can choose which agency will process the charge under which statute.

It is highly doubtful that Congress intended mandatory deferral to be applied in practice only where the claimant's first contact happens to be with the state agency. The EEOC and CCRD have created a "sleight of hand" procedure which in effect allows the EEOC to completely ignore the deferral requirement when a claimant initially goes to the EEOC to file a charge. The two agencies merely shuffle some papers back and forth, by means of which the EEOC nominally refers the charge to the CCRD, and the CCRD mechanically waives the deferral requirement while retaining the right to act on the charge in the future. This superficial ruse utterly evades the Congressional intent. The EEOC seeks to short-circuit the statute in order to enlarge its own jurisdiction.

Contrary to the EEOC's arguments, no dire consequences result from the Tenth Circuit's decision. The fact that certain charges filed beyond 240 days might be untimely flows directly from this Court's holding in *Mohasco*. There the Court acknowledged that "time limitations are inevitably arbitrary to some extent," 447 U.S. at 818, and the Court stated:

> It is not our place simply to alter the balance struck by Congress in procedural statutes by favoring one side or the other in matters of statutory construction.

447 U.S. at 826. The Court also noted that any complainant who simply files within the basic 180-day limitation period of Title VII will experience no difficulty as a result of Title VII's deferral provisions. 447 U.S. at 815. Further, limitation periods are "primarily designed to assure fairness to defendants" by protecting them from stale claims. *Burnett v. New York Central R. Co.*, 380 U.S. 424, 428 (1965).

The EEOC's complaint that the Tenth Circuit's decision will needlessly require 60 days of inaction in many cases is speculative and improbable. The worksharing agreement's arbitrary requirement[28] that the CCRD not take immediate action on charges initially submitted to the EEOC is most probably premised simply on the assumption that such state delay will enable the EEOC lawfully to take immediate action. The Tenth Circuit's decision to the contrary will more probably induce the CCRD to immediately process all charges, as required by Colorado law,[29] without any

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[28] The worksharing agreement's distinction between charges on the basis of where they are first submitted is totally arbitrary, because, for example, that distinction does not consider different areas of expertise of the agencies, and it leaves workload allocation to chance. The EEOC's argument that there may be sound reasons for a state agency to waive initial investigation of a charge (EEOC Br. 27 n.23) implies that the state agency may consider each charge individually. To the contrary, the EEOC's retention and immediate investigation of Ms. Leerssen's charge (and countless others) was entirely prearranged. If Ms. Leerssen had chanced to originally submit her charge to the CCRD, that agency would have fully processed it immediately.

[29] In appropriate cases, the state agency could also simply terminate its proceedings, particularly where the charge is untimely under state law, and thereby allow the EEOC to proceed without waiting 60 days. Such termination of a charge which has already been filed would not, as suggested by the State of Colorado in its amici brief, deprive the complainant of all rights to relief in Colorado, even if the charge were subsequently found to be beyond Title VII's jurisdiction. Colorado law provides a private right of action to the complainant. C.R.S. § 24-34-306(11) (App., *infra*, 8a-9a). The fact that Colorado law has a broader

distinction based upon where they are first submitted. The fact that the CCRD's agreement with the EEOC, if contrary to Title VII, may need revision does not justify ignoring the statutory language chosen by Congress.

As recognized by Senator Clark in one of his answers to certain questions raised by Senator Dirksen with respect to the original House-approved bill:

> This provision [providing for deferral agreements with state agencies] has two beneficial effects: (1) it will induce the States to enact good laws and enforce them, so as to have the field to themselves; and (2) it will permit the Federal FEPC to concentrate its efforts in the States which do not cooperate.[30]

The EEOC cannot avoid the mandatory deferral requirements of Section 706(c) through a contractual agreement with the CCRD.[31] Further, the extended filing period is provided in Section 706(e) only to accommodate that mandatory deferral. The EEOC desires all the benefits of Section 706(e), an extra 120 days, without fulfilling the prerequisites of Section

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reach than Title VII, covering all employers regardless of size, simply presents another good reason for the EEOC to defer and for the CCRD to fulfill its responsibility to promptly investigate all charges.

[30] *Legislative History of Titles VII and XI of Civil Rights Act of 1964*, United States Equal Employment Opportunity Commission, at 3012.

[31] The EEOC's position so completely stands the statute on its head that the EEOC even speaks of "all charges that the state agency defers to the EEOC" (EEOC Br. 24 n.20). This concept of reverse deferral nowhere finds expression in the language or history of Title VII.

706(c), mandatory deferral. The EEOC cannot have it both ways. Even if this Court were to find merit in the arguments of the EEOC and the amici States that good reasons now exist for not applying Section 706 in accordance with its terms, those arguments may rightfully be acted upon only by Congress:

> the fact that a given law or procedure is efficient, convenient, and useful in facilitating functions of government, standing alone, will not save it if it is contrary to [law].

(Pet. App. 13a) (quoting *Bowsher v. Synar*, 106 S.Ct. 3181, 3193-94 (1986)) (quoting *INS v. Chadha*, 462 U.S. 919, 944 (1983)).

II. THE CCRD LACKED AUTHORITY TO GRANT OR SEEK RELIEF BECAUSE THE CHARGE WAS UNTIMELY UNDER COLORADO LAW, AND THEREFORE TITLE VII'S EXTENDED 300-DAY FILING PERIOD DOES NOT APPLY.

Even assuming arguendo that "initial waiver of processing" pursuant to the worksharing agreement equals "termination," thereby allowing the charge to be "filed" with the EEOC upon receipt on the 290th day, the charge was still untimely, because Title VII's extended 300-day filing period does not apply in this case.

Ms. Leerssen's charge was first submitted on the 290th day, well beyond Colorado's six-month period of limitations. C.R.S. § 24-34-403 (App., *infra*, 9a). Where a charge is untimely under state law, the complainant's Title VII charge must be filed within the basic federal 180-day filing period. In such a case, the state agency lacks that "authority to grant or seek relief" which is required by the terms of Section

706(e) for application of the extended 300-day filing period. Further, where a complainant has passed up the state remedy through dilatory conduct, the purpose for Title VII's extended 300-day filing period is not met. As stated in *Mohasco*, the legislative history of Section 706(e) does not contain

> any "suggestion that complainants in some states were to be allowed to proceed with less diligence than those in other states." [citation omitted] The history identifies only one reason for treating workers in deferral States differently from workers in other States: To give state agencies an opportunity to redress the evil at which the federal legislation was aimed, and to avoid federal intervention unless its need was demonstrated.

447 U.S. at 821. Where a complainant has not proceeded with sufficient diligence to file a timely state charge nor to file a federal charge within the basic 180-day period, no reason exists to reward that dilatory complainant with a bonus filing period of 120 days more than the period which applies to complainants in nondeferral states.

Congress' intent that the extended 300-day filing period apply only to cases where a qualified state agency can actually take action on a charge finds expression also in the proviso that the 300-day period may be cut short when state proceedings are not in progress; a deferral state complainant is in all cases required to file a Title VII charge within 30 days of receiving notice of termination of state proceedings, even if that is less than the 300 days which would have been available if the state agency had continued

to process the charge. Section 706(e). Further, when the EEOC takes immediate action on charges which are untimely under state law, as it did in this case pursuant to 29 C.F.R. § 1601.13(a)(3) (1986), there is no reason to apply the extended 300-day filing period, which was intended only to avoid loss of federal rights while the EEOC is *prohibited* from acting.[32] When a state time limit bars state action, only the basic federal 180-day filing period should apply for purposes of Title VII.

The Tenth Circuit rejected Commercial's argument below that the extended 300-day filing period does not apply where the charge is untimely under state law, relying on its recent decision in *Smith v. Oral Roberts Evangelistic Ass'n, Inc.*, 731 F.2d 684 (10th Cir. 1984) (Pet. App. 6a n.3). In *Oral Roberts*, the

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[32] Commercial notes that the Fourth Circuit recently held the 300-day filing period to be inapplicable in a case involving a worksharing agreement because it was never contemplated that the state agency would play a substantive role in processing the charge. *Dixon v. Westinghouse Electric Corp.*, 787 F.2d 943 (4th Cir. 1986), petition for cert. pending, No. 86-181. Here, unlike *Dixon*, the CCRD retained its statutory authority to take action on the charge in the future, and it did not terminate its proceedings. If the Court were to hold, however, that the worksharing agreement allowed the EEOC to accept Ms. Leerssen's charge as "filed" immediately upon receipt, there again would be no reason to apply the extended 300-day filing period, the sole purpose of which was to avoid loss of the complainant's federal rights while the EEOC is prohibited from acting. To be consistent with the language of Section 706(e), however, a holding in this case that the worksharing agreement renders the 300-day filing period inapplicable might first require the conclusion that the retention by the CCRD under the worksharing agreement of all its rights to take action in the future is not the sort of "authority to grant or seek relief" which Section 706(e) contemplates and requires.

Tenth Circuit overruled its previous holding to the contrary in *Dubois v. Packard Bell*, 470 F.2d 973 (10th Cir. 1972), believing such result to be mandated by the intervening decisions of this Court in *Mohasco* and *Oscar Mayer*.

In reading *Mohasco* as implicitly overruling *Dubois*, the Tenth Circuit in *Oral Roberts* relied upon footnotes 16 and 19. There this Court rejected cases holding that, as a matter of *federal* law, a state charge must always be filed within 180 days in order to qualify for Title VII's extended 300-day filing period, even if the state's limitation period exceeds 180 days. Footnotes 16 and 19 in *Mohasco* do not state, however, that the 300-day extended filing period applies even where the charge is untimely under state law. That question was not even before the Court, since Mr. Silver's charge, though filed beyond 180 days, was timely under the one-year period of limitations provided by New York law.[33]

Footnote 16 in *Mohasco* also states that a complainant in a deferral state having an FEP agency more than one year old

> need only file his charge within 240 days of the alleged discriminatory employment practice in order to insure that his federal rights will be preserved.

447 U.S. at 814 n.16. Again, however, this accurately describes the rule where the charge is timely under state law, and this Court was not faced with a situation where the charge was untimely under state law.

[33] All but seven of the 44 designated Section 706 deferral states have limitations periods of at least 180 days. The seven exceptions all have 90-day limitation periods.

In short, nothing in *Mohasco* compels or expressly permits the conclusion that a charge's untimeliness under state law is irrelevant for purposes of the applicability of the extended 300-day filing period. Justice Stewart clearly recognized this fact in his subsequent dissent in *Delaware State College v. Ricks*, 449 U.S. 250 (1980). Citing *Mohasco*, Justice Stewart stated:

> Title VII would allow Ricks 300 days if he had "initially instituted" proceedings with a local or state agency with authority to grant him relief. [citations omitted] *To benefit from this provision, however, Ricks would arguably have had to make a timely filing with the state agency.* [emphasis added]

449 U.S. at 263 n.2. In *Ricks*, the complainant's charge was untimely under state law. If timeliness under state law had been held irrelevant in *Mohasco*, he would have been entitled to Title VII's 300-day filing period. The Court's majority opinion in *Ricks* stated, however, that it need not consider the applicability of the extended 300-day filing period because the charge was not filed within 300 days. 449 U.S. at 260 n.13. The Court thereby implicitly acknowledged the limited reach of the holding in *Mohasco*. If *Mohasco* had in fact determined that all complainants in deferral states obtain the benefit of the extended 300-day filing period even though their charges may be untimely under state law, there would have been no need for the Court in *Ricks* to determine the issue even if the charge had been filed within 300 days.

Nor does *Oscar Mayer* support the EEOC's position that the extended 300-day filing period applies even where the charge is untimely under state law. *Oscar Mayer* held that commencement of state proceedings in a deferral state is required prior to bringing a civil action under the Age Discrimination in Employment Act of 1967, 29 U.S.C. § 621, *et. seq.* On the issue of timeliness under state law, Commercial understands *Oscar Mayer* to hold only that a plaintiff is not required to file a timely state charge "in order to preserve the federal right of action." 441 U.S. at 753. This Court did not address the availability of the extended federal filing period where a plaintiff's charge is untimely under state law, and a contrary holding in *Oscar Mayer* would have allowed a shorter state period of limitations to completely foreclose federal relief. Here, adoption of Commercial's position would not foreclose relief under Title VII, but would merely apply Title VII's basic 180-day filing period in cases where the complainant lacked the diligence to pursue the available state remedy in a timely fashion.

Prior to *Mohasco*, the EEOC's regulations explicitly recognized that the extended 300-day filing period does not apply where a charge is untimely under state law. As stated by the EEOC at pp. 39-40 n.15 of its amici curiae brief in *Mohasco* (No. 79-616):

> In this regard, the EEOC's regulations provide for the processing of a charge received more than 180 days after the alleged discriminatory act *only* where the charge is still timely under state law. 29 C.F.R. 1601.13(d)(2)(iii) (1979). [emphasis added]

The EEOC subsequently reversed this position, relying on *Mohasco* and *Oscar Mayer*. 46 Fed. Reg. 43037 (1981). As discussed above, however, neither of those cases require or expressly permit the EEOC to thus reverse its interpretation of Section 706.

Even the EEOC's amended regulations, however, implicitly acknowledged that where the charge is untimely under state law, the state agency lacks authority to grant or seek relief. Where a charge is apparently timely under state law, the amended regulations provide detailed instructions for delayed EEOC filing and deferral to the state agency, but only where the state agency has not waived its right to initially process the charge. 29 C.F.R. § 1601.13(a)(4) and (5) (1986) (App., *infra*, 4a-7a). By contrast, charges which are apparently untimely under state law are *always* deemed filed with the EEOC upon receipt, with no need to follow those formal deferral procedures, *regardless of whether the state agency has waived initial processing of such charges.* 29 C.F.R. § 1601.13(a)(3) (1986) (App., *infra*, 4a). The only logical explanation for this regulation is the EEOC's implicit belief that a state agency is unable to act on an untimely charge whether it has waived initial processing or not, so that formal deferral is not required.[34] The EEOC's deletion of the regulation

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[34] The EEOC recently deleted subparagraph (a)(3) and made certain changes to subparagraphs (a)(4) and (a)(5), claiming that its intent "has been misconstrued." 52 Fed. Reg. 10224 (1987). The EEOC claims that its intent in promulgating subparagraph (a)(3) was to communicate its practice of filing such untimely charges upon receipt based upon prior state agency waivers of the right to process such untimely charges. The same result could have been achieved (and now is achieved under the revised

and decision not to rely on it before this Court (Reply Memo 5 n.4) does not negate its significance as implicit evidence of the EEOC's belief. Where a state agency lacks authority to grant or seek relief, the basic 180-day filing period should apply.

Colorado law requires a charge of employment discrimination to be filed within six months of the alleged unlawful employment practice. C.R.S. § 24-34-403. Ms. Leerssen failed to file any charge until more than nine months after the alleged discriminatory act of which she complains. The CCRD therefore lacked the "authority to grant or seek relief" which is required for application of the extended 300-day filing period. This is true even though Colorado's six-month filing period is a statute of limitations which by regulation respondents must affirmatively plead.[35]

Even if the timeliness of a state charge cannot be conclusively determined on the date it is submitted,

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regulations), however, by applying subparagraph (a)(5)(ii)(A) (App., *infra*, 6a) to both timely and untimely charges. The only additional effect, and therefore presumably the only purpose, of subparagraph (a)(3) was to eliminate the need for formal deferral in precisely those situations where the state agency has *not* made an advance waiver of initial processing.

[35] The Tenth Circuit concluded (Pet. App. 15a), and Commercial agrees, that the CCRD's representations in its letter (Pet. App. 55a-56a) and its affidavit (J.A. 9-11) that it never had jurisdiction over Ms. Leerssen's charge were contrary to the CCRD's own regulations, which provide that the state time limit bars a claim only "where the respondent objects that the charge is not timely filed." 3 Code of Colorado Regulations 708-1, Rule 10.4(F)(2) (App., *infra*, 9a). Further, the Colorado Court of Appeals has recently ruled that the six-month limitation period is subject to equitable tolling. *Quicker v. Colorado Civil Rights Commission*, No. 86 CA 1070 (Colo. App. July 9, 1987).

once the charge is found to be untimely it then becomes clear that the state agency lacks authority to grant or seek relief. By analogy, even in nondeferral states the timeliness of a Title VII charge (and authority of the EEOC to seek relief) may on occasion only be determinable after investigation of allegations which might support equitable tolling. *See Zipes v. Trans World Airlines, Inc.*, 455 U.S. 385 (1982). The possible additional need to investigate timeliness under state law in order to determine the timeliness for Title VII purposes of a charge submitted between 180 and 300 days is therefore not a sufficient reason to conclude that the timeliness of the charge under state law is irrelevant.[36]

Because Title VII's extended 300-day filing period does not apply where a complainant fails to commence state proceedings within the state's period of limitations, the judgment below that Ms. Leerssen's charge was untimely under Title VII should be affirmed.

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[36] Although Title VII might require that even an apparently untimely charge be deferred to the state agency, *cf. Oscar Mayer*, 441 U.S. at 764-65, that also does not mean that the 300-day period should apply regardless of timeliness under state law. If with respect to any deferred charge it is subsequently determined that the state agency, for whatever reason, lacked authority to grant or seek relief, Section 706(c) would then not apply, and the charge could thus be deemed to have been filed with the EEOC on the original date of receipt. A charge submitted to the EEOC within 180 days would therefore always be timely.

CONCLUSION

The judgment below should be affirmed.

Respectfully submitted,

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APPENDIX

APPENDIX

(Reproduction of Statutes and Regulations)

42 U.S.C. § 2000e-5(c), Section 706(c) of Title VII

(c) In the case of an alleged unlawful employment practice occurring in a State, or political subdivision of a State, which has a State or local law prohibiting the unlawful employment practice alleged and establishing or authorizing a State or local authority to grant or seek relief from such practice or to institute criminal proceedings with respect thereto upon receiving notice thereof, no charge may be filed under subsection (b) of this section by the person aggrieved before the expiration of sixty days after proceedings have been commenced under the State or local law, unless such proceedings have been earlier terminated, provided that such sixty-day period shall be extended to one hundred and twenty days during the first year after the effective date of such State or local law. If any requirement for the commencement of such proceedings is imposed by a State or local authority other than a requirement of the filing of a written and signed statement of the facts upon which the proceeding is based, the proceeding shall be deemed to have been commenced for the purposes of this subsection at the time such statement is sent by registered mail to the appropriate State or local authority.

42 U.S.C. § 2000e-5(d), Section 706(d) of Title VII

(d) In the case of any charge filed by a member of the Commission alleging an unlawful employment practice occurring in a State or political subdivision of a State which has a State or local law prohibiting the practice alleged and establishing or authorizing a

State or local authority to grant or seek relief from such practice or to institute criminal proceedings with respect thereto upon receiving notice thereof, the Commission shall, before taking any action with respect to such charge, notify the appropriate State or local officials and, upon request, afford them a reasonable time, but not less than sixty days (provided that such sixty-day period shall be extended to one hundred and twenty days during the first year after the effective date of such State or local law), unless a shorter period is requested, to act under such State or local law to remedy the practice alleged.

42 U.S.C. § 2000e-5(e), Section 706(e) of Title VII

(e) A charge under this section shall be filed within one hundred and eighty days after the alleged unlawful employment practice occurred and notice of the charge (including the date, place and circumstances of the alleged unlawful employment practice) shall be served upon the person against whom such charge is made within ten days thereafter, except that in a case of an unlawful employment practice with respect to which the person aggrieved has initially instituted proceedings with a State or local agency with authority to grant or seek relief from such practice or to institute criminal proceedings with respect thereto upon receiving notice thereof, such charge shall be filed by or on behalf of the person aggrieved within three hundred days after the alleged unlawful employment practice occurred, or within thirty days after receiving notice that the State or local agency has terminated the proceedings under the State or local law, whichever is earlier, and a copy of such charge shall be filed by the Commission with the State or local agency.

42 U.S.C. § 2000e-8(b), Section 709(b) of Title VII

(b) The Commission may cooperate with State and local agencies charged with the administration of State fair employment practices laws and, with the consent of such agencies, may, for the purpose of carrying out its functions and duties under this title and within the limitation of funds appropriated specifically for such purpose, engage in and contribute to the cost of research and other projects of mutual interest undertaken by such agencies, and utilize the services of such agencies and their employees, and, notwithstanding any other provision of law, pay by advance or reimbursement such agencies and their employees for services rendered to assist the Commission in carrying out this title. In furtherance of such cooperative efforts, the Commission may enter into written agreements with such State or local agencies and such agreements may include provisions under which the Commission shall refrain from processing a charge in any cases or class of cases specified in such agreements or under which the Commission shall relieve any person or class of persons in such State or locality from requirements imposed under this section. The Commission shall rescind any such agreement whenever it determines that the agreement no longer serves the interest of effective enforcement of this title.

29 C.F.R. § 1601.13(a) (1986)

(a) *Initial presentation of a charge to the Commission.* (1) Charges arising in jurisdictions having no 706 Agency are filed with the Commission upon receipt. Such charges are timely filed if received by the

Commission within 180 days from the date of the alleged violation.

(2) A jurisdiction having a 706 Agency without subject matter jurisdiction over a charge (*e.g.*, an agency which does not cover sex discrimination or does not cover nonprofit organizations) is equivalent to a jurisdiction having no 706 Agency. Charges over which a 706 Agency has no subject matter jurisdiction are filed with the Commission upon receipt and are timely filed if received by the Commission within 180 days from the date of the alleged violation.

(3) Charges arising in jurisdictions having a 706 Agency but which charges are apparently untimely under the applicable state or local statute of limitations are filed with the Commission upon receipt. Such charges are timely filed if received by the Commission within 300 days from the date of the alleged violation. Copies of all such charges will be forwarded to the appropriate 706 Agency.

(4) Charges arising in jurisdictions having a 706 Agency and which charges are apparently timely under the applicable state or local statute of limitations, are to be processed in accordance with the Commission's deferral policy set forth below and the procedures in paragraph (a)(5) of this section.

(i) In order to give full weight to the policy of section 706(c) of the Act, which affords State and local fair employment practice agencies that come within the provisions of that section an opportunity to remedy alleged discrimination concurrently regulated by Title VII and State or local law, the Commission adopts the following procedures with respect to allegations of discrimination filed with the Com-

mission. It is the intent of the Commission to thereby encourage the maximum degree of effectiveness in the State and local agencies. The Commission shall endeavor to maintain close communication with the State and local agencies with respect to all matters forwarded to such agencies and shall provide such assistance to State and local agencies as is permitted by law and is practicable.

(ii) Section 706(c) of Title VII grants States and their political subdivisions the exclusive right to process allegations of discrimination filed by a person other than a Commissioner for a period of 60 days (or 120 days during the first year after the effective date of the qualifying State or local law). This right exists where, as set forth in § 1601.70, a State or local law prohibits the employment practice alleged to be unlawful and a State or local agency has been authorized to grant or seek relief. After the expiration of the exclusive processing period, the Commission may commence processing the allegation of discrimination.

(iii) A 706 Agency may waive its rights to the period of exclusive processing of charges under section 706(c) of Title VII with respect to any charge or category of charges. Copies of all such charges will be forwarded to the appropriate 706 Agency.

(5) The following procedures shall be followed with respect to charges which arise within the jurisdiction of a 706 Agency and which are apparently timely under the applicable state or local statute of limitations.

(i) Where any document, whether or not verified, is received by the Commission as provided in § 1601.8

which may constitute a charge cognizable under Title VII, and where the 706 Agency has not waived its right to the period of exclusive processing with respect to that document, that document shall be deferred to the appropriate 706 Agency as provided in the procedures set forth below:

(A) All such documents shall be dated and time stamped upon receipt.

(B) A copy of the original document, shall be transmitted by registered mail, return receipt requested, to the appropriate 706 Agency, or, where the 706 Agency has consented thereto, by certified mail, by regular mail or by hand delivery. State or local proceedings are deemed to have commenced on the date such document is mailed or hand delivered.

(C) The person claiming to be aggrieved and any person filing a charge on behalf of such person shall be notified, in writing, that the document which he or she sent to the Commission has been forwarded to the 706 Agency pursuant to the provisions of section 706(c).

(ii) Charges which arise within the jurisdiction of a 706 Agency and which are apparently timely under the applicable state or local statute of limitations are deemed to be filed with the Commission as follows:

(A) Where the document on its face constitutes a charge within a category of charges over which the 706 Agency has waived its rights to the period of exclusive processing referred to in paragraph (a) (4) (iii) of this section, the charge is deemed to be filed with the Commission upon receipt of the document. Such filing is timely if the charge is received within 300 days from the date of the alleged violation.

(B) Where the document on its face constitutes a charge which is not within a category of charges over which the 706 Agency has waived its right to the period of exclusive processing referred to in paragraph (a)(4)(iii) of this section, the Commission shall process the document in accordance with paragraph (a)(5)(i) of this section. The charge shall be deemed to be filing with the Commission upon expiration of 60 (or where appropriate, 120) days after deferral, or upon the termination of 706 Agency proceedings, or upon waiver of the 706 Agency's right to exclusively process the charge, whichever is earliest. Where the 706 Agency earlier terminates its proceedings or waives its right to exclusive processing of a charge, the charge shall be deemed to be filed with the Commission on the date the 706 Agency terminated its proceedings or the 706 Agency waived its right to exclusive processing of the charge. Such filing is timely if effected within 300 days from the date of the alleged violation.

C.R.S. § 24-4-102(15)

(15) "Rule" means the whole or any part of every agency statement of general applicability and future effect implementing, interpreting, or declaring law or policy or setting forth the procedure or practice requirements of any agency. "Rule" includes "regulation".

C.R.S. § 24-4-103(8)(a)

8(a) No rule shall be issued except within the power delegated to the agency and as authorized by law. A rule shall not be deemed to be within the statutory authority and jurisdiction of any agency merely be-

cause such rule is not contrary to the specific provisions of a statute. Any rule or amendment to an existing rule issued by any agency, including state institutions of higher education administered pursuant to title 23, C.R.S. 1973, which conflicts with a statute shall be void.

C.R.S. § 24-34-306(2)

(2) After the filing of a charge, the director, with the assistance of the staff, shall make a prompt investigation thereof. The director shall determine as promptly as possible whether probable cause exists for crediting the allegations of the charge. If the director determines that probable cause does not exist, he shall dismiss the charge and shall notify the person filing the charge and the respondent of such dismissal. If the director determines that probable cause exists, the respondent shall be served with written notice which states with specificity the legal authority and jurisdiction of the commission and the matters of fact and law asserted. Immediately after such notice has been given, the director shall endeavor to eliminate such discriminatory or unfair practice by conference, conciliation and persuasion.

C.R.S. § 24-34-306(11)

(11) If written notice that a formal hearing will be held is not served within one hundred eighty days after the filing of the charge, or if the hearing is not commenced within the one-hundred-twenty-day period prescribed by subsection (4) of this section, the jurisdiction of the commission over the complaint shall cease, and the complainant may seek the relief authorized under this part 3 and parts 4 to 7 of this

article against the respondent by filing a civil action in the district court for the district in which the alleged discriminatory or unfair practice occurred. If any party requests the extension of any time period prescribed by this subsection (11), such extension may be granted for good cause by the commission, a commissioner, or the hearing officer, as the case may be, but the total period of all such extensions to either the respondent or the complainant shall not exceed ninety days each, and, in the case of multiple parties, the total period of all extensions shall not exceed one hundred eighty days.

C.R.S. § 24-34-403

Time limits on filing of charges. Any charge alleging a violation of this part 4 shall be filed with the commission pursuant to section 24-34-306 within six months after the alleged discriminatory or unfair employment practice occurred.

3 Code of Colorado Regulations 708-1, Rule 10.4(F)(2)

Any charge filed pursuant to 24-34-504, 604 and 706 shall be barred if not filed within the time limits set forth therein; any charges filed pursuant to 24-34-403 shall be barred if not filed within the stated time limit where the respondent objects that the charge is not timely filed.

REPLY

BRIEF

(9)

No. 86-1696

In the Supreme Court of the United States

OCTOBER TERM, 1987

EQUAL EMPLOYMENT OPPORTUNITY COMMISSION,
PETITIONER

v.

COMMERCIAL OFFICE PRODUCTS COMPANY

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

REPLY BRIEF FOR THE PETITIONER

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TABLE OF AUTHORITIES

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Respondent argues that the plain meaning of Section 706(c), 42 U.S.C. 2000e-5(c), compels the conclusion that a state agency cannot "terminate[ ]" its "proceedings," within the meaning of that provision, so long as there appears to be some possibility that the agency will act on the charge sometime in the future. As we explained in our opening brief, however, neither the statutory language nor the legislative history unambiguously establishes the meaning of that provision and the EEOC's contrary interpretation is a fair reading of congressional intent that is entitled to judicial deference. Certainly, neither the language nor the legislative history of the statute supports respondent's further suggestion that a worksharing agreement under which a state agency waives its right to an exclusive period for processing some charges is contrary to congressional purpose. Because state agencies voluntarily enter into such worksharing agreements to promote expeditious, and avoid duplicative, processing of claims, the agreements do not interfere with congressional intent to

provide state agencies with a limited *opportunity* to process claims first.

Finally, there is likewise no merit to respondent's claim that the court of appeals' judgment may be sustained on the alternative ground that Title VII's 300-day limitations period is inapplicable either because the individual complainant's charge was filed outside the state limitations period or because the state agency had waived in advance its initial processing rights over the charge pursuant to a worksharing agreement.

1. a. Respondent argues (Br. 12-16) that the meaning of Section 706(c) is plain and unambiguous and inconsistent with the EEOC's construction of that provision. As explained in our opening brief (at 13-16), however, whether a state agency can "terminate[ ]" its "proceedings," within the meaning of Section 706(c), without permanently relinquishing its jurisdiction over a charge, is not clear from the statutory language. In particular, whether Congress equated "proceedings" with "jurisdiction" and whether Congress intended to require that the "termination" be permanent and irrevocable are not answered by the plain meaning of the statutory language.[1]

Indeed, respondent implicitly concedes the existence of ambiguity by construing Section 706(c) differently than

[1] Contrary to respondent's assertion (Br. 14), this Court's statement in *Mohasco Corp.* v. *Silver*, 447 U.S. 807, 818 (1980), that "the words of the statute are not ambiguous" has no bearing on the issue presented in this case. The quote from *Mohasco* refers only to the meaning of the word "filed" in Section 706(c) and (e), 42 U.S.C. 2000e-5(c) and (e) (see 447 U.S. at 809-810, 818). The Court was not addressing the meaning of either "terminated" or "proceedings" in those provisions. Nor does the Court's use in *Mohasco* (447 U.S. at 816, 821) of the words "completed" or "ended" as apparent synonyms for "terminated" suggest that its meaning is plain and unambiguous (see Resp. Br. 14). This discussion does not answer the question at issue here, whether a temporary cessation of "proceedings" amounts to a "terminat[ion]."

did the court of appeals. The court of appeals held (Pet. App. 9a) that a state agency terminates its proceedings only when it "completely surrenders its jurisdiction over a charge." According to the court of appeals (*id.* at 15a), the surrender must be "final[ ] and unequivocal[ ]," with no remaining "authority to act on the charge at that point or in the future" (Pet. App. 13a n.13 (emphasis omitted)). Unlike the court of appeals, respondent asserts (Br. 16) that a state agency may "terminate[ ] its proceedings" even though the agency retains jurisdiction "to reactivate the charge" "several years later." The dispositive inquiry is said to be whether "there *apparently* remains no possibility whatsoever that the state agency will act further" (*id.* at 24 (footnote omitted; emphasis added)). Under respondent's view, therefore, a court would apparently have to consider the possibility that any jurisdiction retained will in fact be exercised in the future in determining whether state proceedings have been "terminated."

We agree with respondent that the mere retention of a modicum of jurisdiction is not preclusive of a termination of state proceedings. We differ with respondent, however, in that we believe the relevant inquiry is whether the state agency has made clear both its intention not to process the charge any further at this time and its desire to have the EEOC process the charge immediately. That inquiry, unlike the one proposed by respondent, is easily undertaken and is consistent with the purpose of the deferral requirement, which is "to give state agencies an *opportunity* to redress the evil at which the federal legislation was aimed, and to avoid federal intervention unless its need was demonstrated." *Mohasco Corp.* v. *Silver*, 447 U.S. 807, 821 (1980) (footnote omitted; emphasis added); see Gov't Br. 19-21 & n.15.

b. Respondent claims (Br. 17) that a waiver by a state agency of the 60-day deferral period violates the Supremacy Clause because it is contrary to congressional

intent to protect "the interests of employers in having such matters resolved at the local level" (*id.* at 19-20)[2] and to impose "responsibilities" on the states (*id.* at 25-26). Respondent also claims (*id.* at 23 (footnote omitted)) that it is unnecessary because "[i]f the state action were ineffective for any reason, * * * the EEOC would be free to proceed after waiting the relatively short period of 60 days." Respondent's arguments, however, are misdirected because Congress plainly did not mandate that state agencies fully process discrimination charges within their jurisdiction or even maintain exclusive jurisdiction over them for 60 days. As respondent admits (*id.* at 24, 29 n.29), it is undisputed that Congress authorized state agencies to "waive" the 60-day deferral period. See *Oscar Mayer & Co.* v. *Evans*, 441 U.S. 750, 761 (1979). Under Section 706(c), a state agency need only "terminate[ ]" its "proceedings" beforehand. See *Love* v. *Pullman Co.*, 404 U.S. 522, 525-526 (1972). Hence, the only issue presented in this case is whether a state must forever relinquish all jurisdiction over the charge in order to achieve that result. The wisdom or legality of allowing a state to avoid the full 60-day deferral period therefore is not at issue because neither can be disputed.

Respondent, moreover, fails to offer any meaningful evidence to show that a "terminat[ion]" of "proceedings," within the meaning of Section 706(c), requires either, as the court of appeals held (Pet. App. 9a), a permanent

[2] Senator Cotton, upon whose statement favoring local enforcement respondent relies (Br. 19-20, citing 110 Cong. Rec. 12826 (1964)), was a vocal opponent of the bill (see *id.* at 12826), including the Dirksen-Mansfield compromise, and was not in that statement addressing the meaning of the compromise language. In any event, it is well settled that the views of legislative opponents are entitled to little, if any, weight in discerning the intent of Congress. See *Gulf Offshore Co.* v. *Mobil Oil Corp.*, 453 U.S. 473, 483 (1981).

relinquishment of jurisdiction or, as respondent now claims (Br. 24 (footnote omitted)), no "apparent[ ] * * * possibility whatsoever that the state agency will act further." The only legislative history cited by respondent (Br. 24 n.24, quoting 110 Cong. Rec. 13090 (1964) (emphasis in original)) in support of its view is a statement by Senator Case "that the EEOC must wait 60 days 'if there is *possible reason* to believe that a state agency will deal with the matter.' " Where, however, as in this case, the state agency has informed the EEOC that it should process the charge immediately because the state agency will not be doing so there is no "possible reason" to delay processing by the EEOC. That the state agency has nominally reserved its authority to act *after* the EEOC has rendered its final decision does not suggest otherwise, lest the efficient worksharing procedures developed by state and federal officials become like Alphonse and Gaston.

In addition, as fully described in our opening brief (at 25-30), several factors indicate that whether a state agency retains some modicum of jurisdiction is not a matter of congressional concern. First, Congress's choice of language—looking to whether "proceedings" are earlier "terminated"—suggests a concern to avoid simultaneous federal and state agency investigations and hearings. This concern is not implicated when the state agency merely retains jurisdiction over the charge so that it might act following termination of the EEOC proceedings.

Second, there is no reason to presume that Congress intended to disapprove of a state agency's decision to allow the EEOC to process certain charges in the first instance, but retain authority to act on the charge later.[3] The state agency may, for instance, be concerned that the EEOC's investigation will reveal that the federal agency lacks juris-

[3] Contrary to respondent's claim (Br. 25), retention of jurisdiction does not mean that a "state agenc[y] intend[s] to take further action in the future." Were the state agencies intending, as respondent suggests,

diction over the charge.[4] Hence, as described in the amicus brief filed by several states (Colorado Amici Br. 6), to require state agencies to surrender their jurisdiction permanently "places the states in an untenable position."[5]

c. Respondent mistakenly argues (Br. 22 (footnote omitted)) that the "worksharing agreements between the EEOC and over 95% of the designated state deferral agencies," including the Colorado Civil Rights Division (CCRD), are unlawful. According to respondent, the agreements are inconsistent with congressional intent "to prevent federal dominance" (*id.* at 21) and they are contrary to this Court's decision in *Mohasco* (Resp. Br. 27-28).[6]

Contrary to respondent's assertions (Br. 21-22), however, worksharing agreements do not provide for EEOC "dominat[ion]" of the employment discrimination field or allow the EEOC to impose its views or preferences on the state agencies. State agencies freely enter into worksharing agreements, the terms of which are jointly negotiated for the benefit of the state fair employment practice agencies as well as for the EEOC. Indeed,

routinely to act on those charges after the EEOC has reached its final decision, the purpose of their initial decision to waive their exclusive processing rights, which is to reduce the backlog of charges and delay in their processing, would be defeated. See Colorado Amici Br. 4-6.

[4] Each year, the Colorado Civil Rights Division " 'reactivates' " four to five charges after the EEOC determines that federal jurisdiction is lacking (see Colorado Amici Br. 7).

[5] In Section 706(d), 42 U.S.C. 2000e-5(d), Congress expressly provided that a state agency could, for whatever reason, notify the EEOC that it should proceed immediately to process a charge filed by a member of the EEOC. Congress did not require that the state agency permanently relinquish all authority over the charge. Respondent fails to offer any reason why Congress would have intended a different result under Section 706(c).

[6] Respondent also argues (Br. 18-19) that the CCRD's advance waiver of initial processing through its worksharing agreement did not terminate the state proceedings because the waiver was void under state law. This state law claim, however, was "neither pleaded, argued, nor briefed either in the District Court or in the Court of

state agencies, not the EEOC, are the parties that generally insist that they be allowed to "terminate" their initial proceedings without permanently relinquishing their statutory authority over a specific charge (see Colorado Amici Br. 6-7).

Neither the language of Section 709(b), 42 U.S.C. 2000e-8(b), which explicitly authorizes the EEOC to enter into worksharing agreements with state agencies, nor the legislative history of Title VII supports respondent's claim that Congress intended to prevent such arrangements. Section 709(b) does not purport to limit state agency authority to agree to refrain from processing fully certain charges within its jurisdiction.[7] Respondent's reliance (Br. 21-22 (quoting 110 Cong. Rec. 8193 (1964)) on a statement by Senator Dirksen regarding "the tendency of Federal agencies to dominate any field which they are authorized by Congress to enter" is likewise misplaced. That criticism was made before the Dirksen-Mansfield compromise was introduced and was directed to the House-passed bill then pending before the Senate. The House bill did not include a deferral requirement and instead provided for suspension of federal enforcement through cooperative agree-

Appeals" and no exceptional circumstances warrant its consideration by this Court in the first instance. See *Miree* v. *DeKalb County*, 433 U.S. 25, 34 (1977); *Lawn* v. *United States*, 355 U.S. 339, 362-363 n.16 (1958).

[7] There is no merit to respondent's suggestion (Br. 27) that Section 709(b) allows the EEOC to agree to refrain from processing a charge in any cases or class of cases, but does not allow a state agency similarly to agree to refrain from processing certain charges. In particular, no negative inference can be drawn from the fact that Section 709(b) expressly authorizes the EEOC to agree to refrain, but does not mention the possibility of a state agency similarly agreeing to refrain. Congress dictated the authority of the EEOC in Section 709(b) and (properly) did not purport to preempt the authority of state agencies under state law. In any event, the statutory language upon which respondent relies simply illustrates one type of worksharing provision and does not purport to exclude all others.

ments unless the EEOC determined that the state agency was not "effectively exercising" its authority to eliminate and prohibit employment discrimination (H.R. 7152, 88th Cong., 2d Sess. § 708(b), 110 Cong. Rec. 2511-2512 (1964)). As described in our opening brief (at 17-18), Senator Dirksen and others criticized the approach of the House bill on the ground that "[t]he people of the State should have the right to determine the effectiveness of their agencies" (110 Cong. Rec. 6449 (1964)). The statement upon which respondent relies is simply a reiteration of that criticism. It plainly does not support respondent's much broader assertion that Congress intended to prevent a state agency from voluntarily waiving its right to process a charge initially pursuant to a worksharing agreement in order to allow the EEOC instead to act immediately on the charge.

Worksharing agreements do not evade the statutory 60-day deferral period. They simply "ensure expedition in the filing and handling of those complaints" (*Love* v. *Pullman Co.*, 404 U.S. at 526), by allowing the state agency to expedite the process by notifying the EEOC in advance of its intention whether to process initially a particular charge. When the worksharing agreement assigns a particular charge to the state agency (generally charges that are first submitted to that agency (see Pet. App. 48a)), the full 60-day deferral period applies (unless the state proceedings are otherwise terminated beforehand).[8] Only when the state agency has instead agreed in the worksharing agreement to waive initial processing rights over the charge may the EEOC immediately process the charge because of the waiver's "termination" of state proceedings

[8] According to the EEOC, during fiscal years 1986 and 1987, approximately one-third of all employment discrimination charges filed were submitted first to the state agency and, accordingly, were initially processed by those agencies pursuant to the worksharing agreements. Hence, respondent's claim (Br. 13 n.12) that under our view the 60-day deferral period "would * * * never be applied" is incorrect.

(see 29 C.F.R. 1601.13(a)(4)(ii)(A); 52 Fed. Reg. 10224 (1987)).[9]

Contrary to respondent's claim (Br. 27-28, 29 & n.28), the "division of labor" thus achieved does not conflict with this Court's statement in *Mohasco* that a claimant should not be able to select between a federal and state remedy (see 447 U.S. at 821), nor is it "arbitrary." The state agency, not the claimant, has decided that claims submitted first to the state agency will generally be processed fully by the state. This method of assignment is a commonsense, manageable, and fair way for federal and state agencies to work harmoniously towards an appropriate resolution of discrimination charges, without wasteful delay or duplication of effort.[10] Significantly, moreover, the CCRD, like most state agencies, has the right under the worksharing agreement to express an interest in pursuing a specific charge and to ask the EEOC to refrain from processing the charge, notwithstanding the general method of assignment established by the agreement (see Pet. App. 49a).

[9] This case does not raise the issue whether a state agency's advance waiver in a worksharing agreement is effective, because the CCRD otherwise waived its initial processing rights over the charge (see Gov't Br. 31 & n.27). Pursuant to the worksharing agreement, the EEOC transmitted a copy of the charge to the CCRD, and respondent concedes (Br. 6-7) that the CCRD determined not to process the charge initially. Respondent claims (*id.* at 7), however, that CCRD failed to inform the EEOC within the 300-day limitations period that it did not intend to process the charge. But neither the district court nor the court of appeals accepted respondent's factual claim, which the EEOC disputed on the ground that it had received notice of the state's waiver both orally (by telephone) and in writing pursuant to the charge transmittal form completed by the CCRD (see Gov't Br. 5 n.3). As respondent admits (Br. 7 n.7), the court of appeals expressly stated that "[t]he CCRD returned the charge transmittal form to the EEOC and indicated that the CCRD waived its right to initially process the charge" (Pet. App. 2a). See Gov't Br. 5 n.3.

[10] In contrast, respondent's suggestion (Br. 29 n.29) that the EEOC and the CCRD are obliged to divide up discrimination charges by "areas of expertise" would needlessly complicate the coordination of both agencies' programs.

2. Respondent alternatively argues (Br. 31-39) that the EEOC lacks jurisdiction because "[w]here a charge is untimely under state law, the complainant's Title VII charge must be filed within the basic federal 180-day filing period" (*id.* at 31). According to respondent (Br. 31-32), when the charge is untimely under state law, a state agency "lacks that 'authority to grant or seek relief' which is required by the terms of Section 706(e) for application of the extended 300-day filing period." Respondent, however, misapprehends the plain import of the statutory language, and its proposed construction of Section 706(e) cannot be reconciled with this Court's prior decisions in *Oscar Mayer & Co.* v. *Evans*, 441 U.S. 750 (1979), and *Mohasco*. For this reason, seven circuits, including the court of appeals in this case (see Pet. App. 6a), have already rejected respondent's argument in Title VII cases,[11] and three additional circuits have rejected a closely related argument in cases arising under the Age Discrimination in Employment Act (ADEA), 29 U.S.C. (& Supp. III) 621 *et seq.*[12] No circuit has yet ruled in favor of respondent's view.

a. Section 706(e) of Title VII provides for a 180-day federal limitations period for the filing of employment discrimination charges under the Civil Rights Act, "except that in a case of an unlawful employment practice with respect to which the person aggrieved has initially in-

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[11] See *Gilardi* v. *Schroeder*, No. 86-2728 (7th Cir. Nov. 3, 1987), slip op. 7-8; *Mennor* v. *Fort Hood Nat'l Bank*, 829 F.2d 553, 556 (5th Cir. 1987); *Maurya* v. *Peabody Coal Co.*, 823 F.2d 933, 935 (6th Cir. 1987); *EEOC* v. *Shamrock Optical Co.*, 788 F.2d 491, 493-494 (8th Cir. 1986); *Thomas* v. *Florida Power & Light Co.*, 764 F.2d 768, 771 (11th Cir. 1985); *Howze* v. *Jones & Laughlin Steel Corp.*, 750 F.2d 1208, 1211 (3d Cir. 1984); *Smith* v. *Oral Roberts Evangelistic Ass'n, Inc.*, 731 F.2d 684, 687-690 (10th Cir. 1984).

[12] *Aronsen* v. *Crown Zellerbach*, 662 F.2d 584, 590-591 (9th Cir. 1981), cert. denied, 459 U.S. 1200 (1983); *Ciccone* v. *Textron, Inc.*, 651 F.2d 1, 2 (1st Cir.), cert. denied, 452 U.S. 917 (1981); *Goodman* v. *Heublein, Inc.*, 645 F.2d 127, 132 (2d Cir. 1981).

stituted proceedings with a State or local agency with authority to grant or seek relief from such practice * * *, such charge shall be filed * * * within three hundred days" (42 U.S.C. 2000e-5(e)). As more fully elaborated in Section 706(c) of Title VII, the relevant inquiry is whether there is a "State or local law prohibiting the unlawful employment practice alleged and establishing or authorizing a State or local authority to grant or seek relief from such practice." The applicability of a state limitations period is a wholly distinct and unrelated matter, which depends neither on the nature of the employer's conduct and the substantive scope of state law nor on whether there is a state agency generally authorized to enforce the law; it instead depends on how promptly the employee subsequently initiated formal grievance proceedings. In this case, the extended limitations period is therefore triggered by the fact that Colorado law both prohibits the type of conduct alleged and authorizes the CCRD to grant relief from such conduct.

b. This Court's decisions in *Oscar Mayer* and *Mohasco* confirm that result. In *Oscar Mayer*, the Court held that the submission of even an untimely charge to the state agency is sufficient under the ADEA to "commence" state proceedings and thus allow the filing of a federal lawsuit as required by Section 14(b) of that Act, 29 U.S.C. 633(b). The Court concluded (441 U.S. at 759) that "there is no requirement that, in order to commence state proceedings and thereby preserve federal rights, the grievant must file with the State within whatever time limits are specified by state law."

This Court, moreover, left no doubt that the same reasoning applies to Title VII, upon which the Court heavily relied to support its holding regarding the meaning of the ADEA. The Court stated (441 U.S. at 756 (citation omitted)) that "[s]ince the ADEA and Title VII share a common purpose, the elimination of discrimination in the

workplace, since the language of § 14(b) is almost *in haec verba* with § 706(c), and since the legislative history of § 14(b) indicates that its source was § 706(c), we may properly conclude that Congress intended that the construction of § 14(b) should follow that of § 706(c)." The Court accordingly relied (441 U.S. at 761) heavily on the legislative history of Title VII and its administrative implementation, including an administrative construction of Title VII by the EEOC that concluded that an untimely state complaint satisfies the deferral requirement of Section 706(c) and triggers the extended charge-filing period of Section 706(e).

Respondent's effort (Br. 36) to distinguish *Oscar Mayer* is unpersuasive. Contrary to respondent's claim (Br. 36), this Court *did* necessarily "address the availability of the extended federal filing period where a plaintiff's charge is untimely under state law." For absent the implicit conclusion that the state agency was "an authority [authorized] to grant or seek relief" and, hence, the plaintiff was entitled to the extended filing period under Section 7(d) of the ADEA, 29 U.S.C. 626(d),[13] there would have been no obligation under Section 14(b) to defer to the state agency, or to assure the "commencement" of state proceedings as a prerequisite to suit. Given the clear statutory parallel between Title VII and the ADEA, *Oscar Mayer* thus makes clear that an untimely state charge suffices to trigger the extended 300-day filing period provided by Section 706(e).[14]

[13] Section 7(d) of the ADEA, like Section 706(e) of Title VII, provides an extended 300-day federal limitations period where a state agency has overlapping authority over the subject-matter of the age discrimination charge (see 29 U.S.C. 626 (d)).

[14] Respondent does not dispute that proceedings "commenced" as required by the Section 706(c) deferral requirement are likewise "instituted" within the meaning of Section 706(e)'s provision for an extended 300-day filing period. In any event, because the extended filing period of Section 706(e) was in part provided to protect federal rights during the Section 706(c) deferral (see *Mohasco*, 447 U.S. at 821), Congress plainly intended to equate the two terms. This Court's decisions and the legislative debates concerning passage of Title VII reflect that understanding. See *Mohasco Corp.* v. *Silver*, 447 U.S. at 816-817; *Love* v. *Pullman Co.*, 404 U.S. at 526; 110 Cong. Rec. 12723 (1964) (remarks of Sen. Humphrey) (characterizing both as "prior resort to • • • State agency").

This Court's decision in *Mohasco* likewise requires rejection of respondent's claim that the 300-day federal limitations period does not apply to charges that are untimely under state law.[15] In *Mohasco*, the Court expressly adopted (447 U.S. at 814 n.16) the view that "a complainant in a deferral State having a fair employment practices agency over one year old need only file his charge within 240 days of the alleged discriminatory employment practice in order to insure that his federal rights will be preserved." Under respondent's view (see Resp. Br. 34),

[15] Respondent errs in claiming (Br. 36) that the EEOC, prior to *Mohasco*, had concluded that the extended limitations period did not apply when the charge was untimely under state law. Although then-existing EEOC regulations might appear to suggest such a view (see 43 Fed. Reg. 50429 (1978)), two earlier EEOC decisions (see EEOC Dec. (CCH) ¶ 6024 (1973); EEOC Dec. (CCH) ¶ 6058 (1973)) and the comment in the EEOC's amicus brief in *Mohasco* (at 39-40 n.15) regarding the import of this Court's decision in *Oscar Mayer* suggest otherwise. Nor, contrary to respondent's other claim (Br. 37), did EEOC's subsequent procedural regulations (recently amended) "implicitly acknowledge[]" that a state agency lacks "authority to grant or seek relief," within the meaning of Section 706(c) and (e), over charges that are untimely under state law. In recently amending the procedural regulation upon which respondent relies, the EEOC stated that it never intended to suggest that the deferral requirement of Section 706(c) did not apply to charges that were untimely under state law. See 52 Fed. Reg. 10224 (1987). To make it perfectly clear that the deferral requirement applies "to all charges arising in jurisdictions having a 706 agency with subject matter jurisdiction over the charges without regard to their timeliness under State or local law" (*ibid.*), the EEOC recently deleted the former regulation and amended others.

however, the Court's statement would be accurate only where the applicable state statute of limitations is at least 240 days, which is true in only a small minority of states.[16] Respondent's suggested qualification would effectively emasculate the *Mohasco* rule and, contrary to the Court's admonishment in that case, "read in a time limitation provision that Congress has not seen fit to include" (447 U.S. at 816 n.19).[17]

c. Finally, respondent's approach is simply unworkable. As this Court noted in *Oscar Mayer*, most time

[16] Only nine states currently have limitations periods greater than 240 days. California, District of Columbia, Idaho, New York, Oregon, and Rhode Island currently have limitation periods of one year, and Alaska, Minnesota, and Wisconsin allow 300 days for filing. See Alaska Admin. Code tit. 6, § 30 (1981); Cal. Gov't Code § 12960 (West Supp. 1988); D.C. Code Ann. § 1-2544(a) (1987); Idaho Comm'n on Human Rights R. 2.7(a); Minn. Stat. Ann. § 363.06, Subd. 3 (West Supp. 1988); N.Y. Exec. Law § 297(5) (McKinney 1982); Or. Rev. Stat. § 659.040(1) (1985); R.I. Gen. Laws § 28-5-28 (1986) (see R.I. Comm'n for Human Rights R. 4.05); Wis. Stat. Ann. § 111.39(1) (West Supp. 1987). See generally, 8A Fair Empl. Prac. Man. (BNA) 451:1 to 457:3511.

[17] Nothing in the Court's opinion in *Mohasco* supports respondent's suggestion (Resp. Br. 34) that the Court's statement was based on the fact that the state statute of limitations in that case happened to have been one year (see 447 U.S. at 810 n.4). Indeed, portions of the Court's opinion reflect a contrary view. For instance, in stating that an individual in a deferral state need only file his complaint within 240 days to be insured of its timeliness under federal law, the Court said that it was "adopt[ing]" the Seventh Circuit's decision in *Moore* v. *Sunbeam Corp.*, 459 F.2d 811 (1972). In *Moore*, the court of appeals applied the longer federal limitations period even to those acts for which the complainant's filing of a charge with the state agency was untimely under State law (see 459 F.2d at 821-822, 826-828; Ill. Rev. Stat. ch. 48, § 858A (1966)). Equally misplaced is respondent's reliance (Br. 35) on comments made by Justice Stewart in dissent in *Delaware State College* v. *Ricks*, 449 U.S. 250, 260 n.13, 263 n.2 (1980) regarding whether the 300-day limitation period applies when a Title VII charge is not timely filed with a state agency. "[C]omments in the dissenting opinion * * * are just that: comments in a dissenting opinion" (*United States Railroad Retirement Bd.* v. *Fritz*, 449 U.S. 166, 177 n. 10 (1980)). The majority opinion stated not, as respondent suggests, that the issue was still open, but merely that the Court did not need to address the issue in that case (449 U.S. at 260 n.13).

limitations are affirmative defenses and not jurisdictional bars (see 441 U.S. at 760). For instance, as respondent acknowledges (Br. 38 n.35), the Colorado six-month limitations period is not self-executing and, like the federal limitations period (cf. *Zipes* v. *Trans World Airlines, Inc.*, 455 U.S. 385, 393 (1982)), is subject to equitable tolling.[18] Accordingly, under respondent's view (Br. 39), it will be necessary "to investigate timeliness under state law in order to determine the timeliness for Title VII purposes of a charge submitted between 180 and 300 days." Unlike respondent, we cannot suppose that Congress intended to insert that additional procedural layer into Title VII, which is "a statutory scheme in which laymen, unassisted by trained lawyers, initiate the process" (*Love* v. *Pullman Co.*, 404 U.S. at 527).

3. Respondent may also be relying on the reasoning of the Fourth Circuit in *Dixon* v. *Westinghouse Electric Corp.*, 787 F.2d 943 (1986), petition for cert. pending, No. 86-181, as another possible ground in support of the judgment of the court of appeals. In *Dixon*, the court of appeals held that the 300-day charge filing period, made applicable by Section 706(e) of Title VII when the complainant "initially institute[s] proceedings" with a state agency, does not apply where the EEOC and the state agency have agreed in advance, through a worksharing agreement, that the EEOC rather than the state agency will initially process the complainant's charge.

The extent of respondent's reliance on *Dixon*, however, is not clear. In opposing the petition for a writ of certiorari in this case, respondent explicitly disavowed any reliance on *Dixon*.[19] In its merits brief, however, respondent now

[18] Indeed, the court of appeals in this case ruled (Pet. App. 15a n.14), and respondent argues (Br. 38 n. 35), that because the state limitations period is not self-executing the CCRD could not claim that it "at no time had jurisdiction over [the] charge."

[19] "Here, completely unlike *Dixon*, the [state fair employment practice agency] clearly indicated that it would take further action on the

argues (Br. 33 n.32), like the *Dixon* court, that "[i]f the Court were to hold * * * that the worksharing agreement allowed the EEOC to accept Ms. Leerssen's charge as 'filed' immediately upon receipt, there * * * would be no reason to apply the extended 300-day filing period." See Resp. Br. 11 ("EEOC * * * cannot both avoid the deferral requirements of Section 706(c) [through a worksharing agreement] and obtain the benefits of the extended 300-day filing period under Section 706(e)" (emphasis omitted)).

In any event, any reliance on *Dixon* would be misplaced because the decision of the Fourth Circuit in that case is incorrect. As more fully described in our amicus brief in support of a petition for a writ of certiorari in that case,[20] Section 706(e)'s 300-day limitations period still applies because the terms of the worksharing agreement, including the advance waiver provision, neither render the CCRD other than "a State * * * agency with authority to grant or seek relief from [the alleged discriminatory practice]," nor prevent a charge first filed with the EEOC from being "initially instituted" with the CCRD by the EEOC on the complainant's behalf.

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charge. No argument was ever raised in this case that proceedings were not 'initially instituted' with the [state agency]. Because the facts of the case are so different from the facts in *Dixon*, there is no conflict between the statement here that proceedings were instituted with the state agency and the holding in *Dixon* that they were not." Br. in Opp. 9-10

[20] The United States and the EEOC, as amici curiae, have filed two briefs in the *Dixon* case. In the first, we argue that the decision of the court of appeals in *Dixon* is incorrect, conflicts with decisions of this Court and of other courts of appeals, and we recommend that this Court grant the petition. In a second supplemental filing, we advise the Court of intervening developments, including the grant of a writ of certiorari in this case. Finally, we have more recently filed a petition for a writ of certiorari in *EEOC* v. *Ocean City Police Dep't*, No. 87-476, which also raises the *Dixon* issue. Copies of all three filings have been provided to respondent.

For the foregoing reasons, and the reasons stated in our opening brief, the judgment of the court of appeals should be reversed.

CHARLES FRIED
Solicitor General

CHARLES A. SHANOR
General Counsel
Equal Employment Opportunity Commission

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AMICUS CURIAE

BRIEF

(6)

No. 86-1696

In The

Supreme Court of the United States

October Term, 1986

EQUAL EMPLOYMENT OPPORTUNITY COMMISSION,

Petitioner,

vs.

COMMERCIAL OFFICE PRODUCTS COMPANY,

Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

BRIEF OF AMICI CURIAE IN SUPPORT OF PETITIONER

THE STATE OF COLORADO JOINED BY CONNECTICUT, DISTRICT OF COLUMBIA, MISSOURI, NEW JERSEY, NEW YORK, TEXAS, WISCONSIN AND WYOMING

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QUESTION PRESENTED FOR REVIEW

1. Whether a state agency's routine decision to defer initial processing of a discrimination charge to the Equal Employment Opportunity Commission (EEOC), pursuant to a worksharing agreement, constitutes a "termina-t[ion]" of state proceedings within the meaning of section 706(c) of Title VII of the Civil Rights Act of 1964, 42 U.S.C. 2000e-5(c), so that the EEOC may immediately deem the charge as filed, rather than being required to wait until 60 days after the commencement of state proceedings.

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Statutes

TABLE OF AUTHORITIES—Continued

STATEMENT OF INTEREST OF AMICI CURIAE

Pursuant to United States Supreme Court Rule 36.4 the states of Colorado, Connecticut, Missouri, New Jersey, New York, Texas, Wisconsin, Wyoming and the District of Columbia ("the amici states"), through their chief law enforcement officers, file this brief in support of the Equal Employment Opportunity Commission ("EEOC"). The amici believe the EEOC will fully cover the legal arguments; therefore, this brief addresses only those policy issues which significantly impact the amici states.

The decision of the Tenth Circuit Court of Appeals in this case misconstrues Title VII and frustrates the congressional intent to ensure state and local agencies the oppportunity to employ their expertise to resolve discrimination complaints. The court of appeals decision would require a state agency to completely relinquish any interest in a charge in order to reduce the 60-day deferral period. A state agency would be barred from seeking federal involvement and would be unable to secure expeditious attention to its citizens' claims through cooperative federal and state efforts. Requiring relinquishment of jurisdiction over a charge in order to reduce the deferral period may also cut off an individual claimant's rights under state law. Thus, the court of appeals decision places a state in an untenable position.

It is these concerns which prompt the filing of this brief.

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SUMMARY OF THE ARGUMENT

Worksharing agreements between state and local agencies and the EEOC may vary from state-to-state but the worksharing agreement between the EEOC and the CCRD

is not uncommon. Although worksharing agreements may vary among the states, all of the amici states share the concern that an affirmance of the decision of the Tenth Circuit Court of Appeals will hinder their efforts to resolve discrimination complaints concerning their citizens. This brief addresses the specific circumstances of the agreement between the EEOC and the CCRD since it is that agreement which is directly involved in this case.

The terms of the worksharing agreements of the type between the EEOC and the CCRD promote cooperative state and federal efforts to eradicate discrimination, allow states an opportunity to resolve charges initially and protect possible state remedies for individual complainants. The waiver provisions of these agreements further the overall purposes of both Title VII and state antidiscrimination laws. State discretion to resolve civil rights complaints is frustrated, and ultimately usurped, by the court of appeals decision that a state terminates its proceedings within the context of section 706(c) of Title VII of the Civil Rights Act of 1964, 42 U.S.C. 2000e-5 (1982) only when it completely surrenders its jurisdiction over a charge.

ARGUMENT

I.

The Court of Appeals decision equating "termination of state proceedings" with complete surrender of jurisdiction frustrates state interests and state antidiscrimination laws.

The State of Colorado, through the Colorado Civil Rights Division ("CCRD"), a deferral agency, has entered

into a worksharing agreement with the EEOC.[1] Pursuant to the terms of this agreement, the EEOC is designated as an agent for the CCRD for purposes of accepting charges, and the CCRD is reciprocally designated as an agent for EEOC for this purpose. In general, charges initially filed with the EEOC are processed by that agency, and charges initially filed with the CCRD are processed by the CCRD. The CCRD waives its right to the 60-day exclusive processing period for charges initially received by the EEOC but does not completely relinquish jurisdiction over the charge.[2] The CCRD reserves the right to review the EEOC's findings and, if appropriate, to proceed further after the EEOC has completed its proceedings. It was pursuant to this worksharing agreement that the underlying charge in this case was referred by the EEOC to the CCRD which, according to its common practice, elected waiver of its right to initially process the charge. The other amici states utilize similar processes for implementing their worksharing agreements with the EEOC.

The Tenth Circuit Court of Appeals below held that "[w]hen a complainant files a charge with the EEOC, the deferral of that charge by the EEOC is an initial filing in the state agency sufficient to invoke the 300 day time limitation." 803 F.2d 581, 586 (1986). However, the court of appeals found that the charge was not filed with the EEOC within the 300 day time limit of section 706(e) because the state agency's waiver of its right to initially process the

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[1] 29 C.F.R. 1601.74. The Colorado State Personnel Board is also a deferral agency, but only as to those charges involving personnel actions which take place in the Colorado State Personnel System.

[2] A copy of this agreement is attached as Appendix N to the EEOC's Petition for Writ of Certiorari.

charge and its retention of jurisdiction was not a termination of proceedings under section 706(c). Therefore, there was no reduction of the 60-day deferral period to the state agency. The court held that "[i]n the context of section 706(c), a state 'terminates' its proceedings only when it completely surrenders its jurisdiction over a charge." 803 F.2d 581, 587.

The legislative history of Title VII's deferral provisions shows that a quarter of a century ago it was assumed that a 60-day time period was adequate for a state agency to investigate an employment discrimination charge.[3] However, as noted by the court of appeals in this case, "[t]he current backlog of cases at many State agencies and the EEOC must cause officials today to look wistfully at the period . . . described." 803 F.2d at 588, n.12.

In fiscal year 1964-65, 138 formal charges were filed with the CCRD.[4] In fiscal year 1986-87, the CCRD had an annualized caseload of 1,239 charges.[5] The CCRD now expends 160-165 days to investigate and conclude the average charge. The minimum processing time for a charge

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[3] *Congressional Record 11937 (1964)* (remarks of Senator Humphrey); *id.* at 8193, 13087 (remarks of Senator Dirksen), cited in *Mohasco Corp. v. Silver*, 447 U.S. 807, 821 at n.32 & n.34 (1980).

[4] Colorado Civil Rights Commission Activities Report 1964-1965, p. 7. This figure includes charges based on alleged discrimination in the areas of employment, housing and public accommodation. For the convenience of the court a copy of this report has been lodged with the clerk.

[5] Colorado Civil Rights Commission, CCRC Case Control Statistical Reports, dated July 15, 1987, Table 2. This figure includes charges based on alleged discrimination in the areas of employment, public accommodation, housing and handicap. For the convenience of the court a copy of this document has been lodged with the court for reference.

is 60-90 days. Although a 60-day period may have been envisioned as adequate at one time, it is no longer so. Twenty-three years after the passage of Title VII there are more charges filed with resulting delays in investigation and resolution.

Federal forums are supplements to available state remedies and recourse to these forums is appropriate when the state cannot provide prompt or complete relief. *New York Gaslight Club, Inc. v. Carey*, 447 U.S. 54 (1980). The deferral agencies know they cannot provide relief within 60 days and for this reason defer charges back to the EEOC. By clarifying primary responsibility for different categories of charges, worksharing agreements benefit both the EEOC and the states. A state's interests are met because employment discrimination charges are investigated and resolved in an efficient and prompt manner without an unnecessary 60-day delay and without duplication of effort. A state owes a duty to its citizens to see that their interests, both those of complainants and employers, are addressed in the most expeditious manner. It is in the best interests of all persons involved in a discrimination charge for it to be resolved as quickly as possible. *See Ford Motor Company v. EEOC*, 458 U.S. 219 (1982). Complainants need to be assured of prompt resolution of meritorious charges. Without such prompt resolution, complainants who have been discriminated against continue to feel the effects of the discrimination. An individual who has suffered a discriminatory discharge may be unemployed or underemployed for a substantial period of time even given conscientious mitigation efforts. The economic effects may be devastating (*e.g.*, inability to adequately feed a family, loss of self-respect, loss of a home for inability to make mortgage or rent payments). Employers are also entitled to prompt resolution. If an

employer has engaged in discriminatory conduct a prompt resolution is necessary so that such conduct ceases and no further individuals fall victim to it. If an employer is found not to have engaged in discriminatory conduct, then the employer deserves to be cleared of the charge. Discrimination is an evil to be eradicated and an accusation of having participated in such conduct is a serious one which should be resolved expeditiously.

To require deferral agencies to completely terminate their interests in order to be able to shorten the 60-day deferral period places the states in an untenable position. The states have a backlog of charges and insufficient resources with which to handle them. Relinquishment cuts off a state's opportunities to address its own local concerns in the future and may cut off all legal remedies for an individual. Although a charge may appear to fall under both state and federal jurisdiction, after investigation it sometimes becomes clear that the EEOC has no jurisdiction over the charge. For example, the employer may not have had 15 or more employees in each of 20 or more calendar weeks in the appropriate period under 42 U.S.C. 2000e(b) (1982). This information may become available only after a period of investigation. However, once this information is known, the EEOC has no choice but to terminate the charge. If the complainant lives in a state with an antidiscrimination law that covers more employers than does Title VII there may have been a state remedy available; but if the state has not retained juris-

diction, the complainant may be too late to file a charge under state law.[6]

In Colorado alone, during the first quarter of 1985, 353,901 individuals worked for employers with fewer than 19 employees.[7] Nationwide, there is a substantial probability of a large number of complainants facing a quandary as to what remedy is available to them and as to where and when they should file charges. To ensure that the avenues of redress are accessible to these individuals, a state retains jurisdiction over charges. Each year the CCRD "reactivates" 4-5 charges in which the EEOC determines after investigation that it has no jurisdiction.

As noted by this Court in *Love v. Pullman*, 404 U.S. 522 (1972) it is normally laymen unassisted by lawyers who initiate the process by the filing of a charge. A complainant would need to have done extensive investigation to determine if the employer had sufficient employees during the requisite statutory period to fall under Title VII's definition of employer. This is an unrealistic and impractical burden to place on an unassisted layman.

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[6] For example, Colorado's Antidiscrimination Act applies to employers regardless of size. Colo. Rev. Stat. sec. 24-34-401(3) (1982). Colorado law further provides that charges must be filed within 6 months after the alleged discriminatory practice occurred. Colo. Rev. Stat. sec. 24-34-403 (1982). This filing time period is a statute of limitations subject to equitable tolling. *Quicker v. CCRC*, No. 86 CA 1070, — P.2d — (Colo. App. July 9, 1987).

Paragraph 4 of the worksharing agreement between the EEOC and CCRD also reflects this concern.

[7] U.S. Department of Commerce, Bureau of the Census, County Business Patterns 1985 Colorado; March 1987, p. 14. For the convenience of the court a copy of this document has been lodged with the clerk.

The court of appeals' interpretation of section 706 is at odds with the purpose of Title VII. It does not foster cooperative federal and state enforcement of antidiscrimination laws. It does not allow Title VII to be a supplementary remedy available to state citizens. Rather, the court of appeals interpretation may work to cut off the state remedies available to some complainants. The objects and policies of Title VII, as well as state antidiscrimination statutes, are frustrated by the court of appeals' decision.

For these reasons the amici states request that this Court overturn the decision of the Tenth Circuit Court of Appeals.

Respectfully submitted,

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AMICUS CURIAE

BRIEF

No. 86-1696

IN THE

Supreme Court of the United States

OCTOBER TERM, 1987

EQUAL EMPLOYMENT OPPORTUNITY COMMISSION,
Petitioner,

v.

COMMERCIAL OFFICE PRODUCTS COMPANY,
Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Tenth Circuit

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BRIEF OF AMICUS CURIAE EQUAL EMPLOYMENT ADVISORY COUNCIL IN SUPPORT OF RESPONDENT

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

TABLE OF AUTHORITIES—Continued

TABLE OF AUTHORITIES—Continued

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BRIEF OF AMICUS CURIAE EQUAL EMPLOYMENT ADVISORY COUNCIL IN SUPPORT OF RESPONDENT

The Equal Employment Advisory Council, with the consent of both parties, respectfully submits this brief as amicus curiae. Statements of consent have been submitted to the Clerk of the Court. This brief contends that the Title VII charge in this case was not timely filed, and thus supports the position of the Respondent.

INTEREST OF THE AMICUS CURIAE

The Equal Employment Advisory Council (EEAC) is a voluntary, nonprofit association organized to promote the common interest of employers and the general public in sound government policies, procedures and requirements pertaining to nondiscriminatory employment practices. Its membership comprises a broad segment of the

employer community in the United States, including both individual employers and trade associations. Its governing body is a Board of Directors composed primarily of experts and specialists in the field of equal employment opportunity. Their combined experience gives the Council a unique depth of understanding of the practical and legal considerations relevant to the proper interpretation and application of EEO policies and requirements. The members of EEAC are firmly committed to the principles of non-discrimination and equal employment opportunity.

Substantially all of the Council's members, or their constituents, are employers subject to the provisions of Title VII of the Civil Rights Act of 1964, as amended, 42 U.S.C. § 2000e *et seq.* As such, they are vitally concerned with the Title VII deferral procedures at issue in this case and their impact on the timely filing of discrimination charges. The Council has filed amicus curiae briefs in several cases interpreting Title VII's deferral procedures and time filing periods, including *United Airlines v. Evans*, 431 U.S. 553 (1977); *Mohasco Corp. v. Silver*, 447 U.S. 807 (1980); *Delaware State College v. Ricks*, 449 U.S. 250 (1980); *Zipes v. TWA*, 455 U.S. 385 (1982); *Dixon v. Westinghouse Electric Corp.*, 787 F.2d 943 (4th Cir. 1986), *petition for cert. pending*, No. 86-181; *Thomas v. Florida Power and Light Co.*, 764 F.2d 768 (11th Cir. 1985); and *Gunn v. Dow Chemical Co.*, 522 F. Supp. 1172 (S.D. Ind. 1981). Because this case and *Dixon v. Westinghouse, supra*, currently pending certiorari, concern the proper interpretation of Title VII's deferral provisions and call for an important application of this Court's ruling in *Mohasco Corp. v. Silver, supra*, EEAC respectfully presents herein its views to the Court.

ISSUES PRESENTED

1. Whether the 300-day exception to Title VII's 180-day filing requirement should be available in cases where the state agency is unable to grant the relief requested in the charge because the charge is untimely under state law.
2. Whether the 300-day exception to Title VII's 180-day filing requirement should be available in cases where the state agency has, through a worksharing agreement, waived its authority to grant the relief requested in the charge by relinquishing charge processing authority to the EEOC.
3. Whether EEOC's transmittal of the charge to the state agency with a notification that it would be processed by EEOC pursuant to the worksharing agreement constituted an "initial institution" of state proceedings.

STATEMENT OF THE CASE

Statutory Background

Section 706(e) of Title VII provides that discrimination charges must be filed within 180 days of occurrence in order to be timely. If, however, the charge arises in a state or local jurisdiction with a law comparable to Title VII and an enforcement agency capable of awarding the relief requested, § 706(c) provides that the state or local agency must first be given an opportunity for up to sixty days to resolve the dispute under local law before the charge may be filed under Title VII. In order to avoid forfeiture of federal Title VII rights during the "deferral" period, § 706(e) provides that where the charging party has "initially instituted" proceedings with a state or local agency having "authority to grant or seek [the requested] relief," the normal 180-day filing period is extended to 300 days. Thus, in order to be timely, either the sixty-day deferral period must expire or the state proceedings must be terminated within 300 days of the alleged unlawful conduct.

The EEOC has entered into worksharing agreements with many state and local agencies ("706 agencies"). Typically, these agreements provide for a sharing of charge processing responsibilities with the 706 agency waiving its § 706(c) deferral privileges over charges assigned to EEOC. Application of these agreements to specific cases has proven troublesome for the lower courts, particularly where the charge is one over which the 706 agency has waived its deferral rights. As discussed further below, problems have centered on three issues:

1. Is the extended 300-day filing period available for charges which cannot be processed by the 706 agency because they are not timely filed under state or local laws?

2. Can charges over which the 706 agency has waived deferral rights in a worksharing agreement be "initially instituted with a state or local agency with authority to grant or seek relief" for purposes of activating the extended 300-day filing period?

3. Does a 706 agency's waiver of deferral rights in a worksharing agreement constitute a "commencement and termination" of state or local proceedings so that the charge may immediately be considered filed under Title VII?

The decision of the Tenth Circuit in this case focused primarily upon the third question even though the record raises issues pertaining to the first two questions as well. Issues one and two, however, are presented directly in a case in which a petition for certiorari is pending, *Dixon v. Westinghouse Electric Corp.*, 787 F.2d 943 (4th Cir. 1986), *petition for cert. pending*, No. 86-181. In light of the split of authority in the lower courts and the uncertainty in the employer community surrounding several aspects of the Title VII deferral process, amicus EEAC will analyze the issues raised in this case on a comprehensive basis.

Factual Background

Suanne L. Leerssen was discharged by Commercial Office Products Company ("Commercial") on June 10, 1983. On March 26, 1984—290 days later—Ms. Leerssen filed a sex discrimination charge with EEOC. EEOC sent a copy of the charge and a charge transmittal form to the Colorado Civil Rights Division (CCRD) stating that EEOC would process the charge pursuant to its worksharing agreement with CCRD. In accordance with the terms of the worksharing agreement, the CCRD waived its right to process the charge. Shortly thereafter, the CCRD sent a form letter to Ms. Leerssen explaining that it had waived its right to investigate her charge but that it might subsequently adopt EEOC's final findings and order.[1]

EEOC began its investigation of the charge on the same day that it was filed, before the CCRD had ever been given a chance to consider processing it. When EEOC sought information relevant to the charge from Commercial, the company refused, believing the charge to be untimely. EEOC issued a subpoena and sought its enforcement in the district court. Agreeing with Commercial that the filing of the Title VII charge was untimely, the district court found that EEOC lacked jurisdiction and denied enforcement of the subpoena.

On appeal by EEOC, the Tenth Circuit affirmed that Ms. Leerssen's charge was not timely and that the EEOC subpoena could not be enforced. The court held that a claimant in a deferral state has 300 days to file a charge with EEOC, but no charge can be filed with EEOC until 60 days after the state agency commences its proceedings or the state proceedings have been earlier terminated.

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[1] After the district court issued a decision in Commercial's favor, CCRD wrote to Ms. Leerssen indicating that her charge should not have been docketed. CCRD explained that because her charge was untimely under Colorado law, the CCRD at no time had jurisdiction over her charge. CCRD attributed the docketing to an "administrative error."

Ms. Leerssen's charge was referred to CCRD 292 days after her termination. Since the full 60-day deferral period would extend well beyond the 300-day time limit, the court was required to determine whether CCRD's waiver of processing rights in the worksharing agreement amounted to a "commencement and termination" of the state proceedings prior to the expiration of the deferral period.

The court of appeals did not discuss whether the waiver in the worksharing agreement precluded Ms. Leerssen's charge from being "initially instituted" with CCRD, or whether it deprived CCRD of the status as an agency having "authority to grant or seek [the requested] relief," both of which are necessary under § 706(e) to activate the extended 300-day filing period. The court did state, however, that

> We cannot construe the ministerial acknowledgement of receipt of the charge transmittal form and the waiver of "*initial* processing" by the CCRD as a commencement and termination of proceedings that operates to reduce the sixty-day deferral period required by § 706(c).

803 F.2d 581, 590. The court below also concluded that in light of CCRD's statement that it retained the right to review and possibly adopt EEOC's final findings and order, the waiver of processing responsibilities did not "terminate" the state proceedings so that the charge could immediately be considered filed under Title VII. In the absence of any other basis for finding that the CCRD proceedings had terminated before the expiration of 300 days, the court found that Ms. Leerssen's charge was untimely filed under Title VII.[2] In dissent, Judge McKay

[2] With regard to the issue of timely filing, the facts in *Dixon v. Westinghouse* parallel those here. There, as here, a terminated employee filed a Title VII sex discrimination charge with EEOC more than 180 days but less than 300 days after her termination. There, as here, the charge was untimely under state law. There, as here, the EEOC routinely referred the charge to a state agency. There, as here, the state agency refused to process the charge on the grounds that under the worksharing agreement the charge investigation had been assigned to EEOC. There, unlike here, the court's analysis focused more fully upon the impact of the worksharing agreement on the *commencement* rather than the *termination* of the local agency's proceedings. Although the charges in both cases were found untimely, the *Dixon* court reasoned that under the worksharing agreement there never was any intention that the local agency would process the charge, and thus no reason to extend the normal 180-day filing period to 300 days. In essence, the court determined that in light of the waiver in the worksharing agreement the charge had not been "initially instituted" with an agency authorized to grant relief as required by § 706(e), and therefore did not qualify for the extended 300-day filing period.

would have found that the state proceedings had "terminated" and that the plaintiff should be allowed the extended 300-day period to file the charge.

SUMMARY OF ARGUMENT

This case raises extremely important issues concerning implementation of Title VII's deferral provisions and their impact on the timely filing of employment discrimination charges. Title VII requires that charges of discrimination be filed within 180 days. The charging party here filed her charge 290 days after her discharge. The charge thus was untimely unless it qualified for the extended 300-day filing period under § 706(e) which is reserved for claims which are "initially instituted" with state or local nondiscrimination agencies having "authority to grant or seek relief" from the alleged unlawful practice.

EEOC contends that the waiver provisions in its worksharing agreements in which state and local agencies are notified of the filing of a charge but both agencies agree that the investigation will be performed by EEOC satisfies the statutory prerequisites for the extended filing period. We disagree. This Court has noted on several occasions that Title VII's deferral provisions are designed to stimulate the *active participation* of state and local agencies in the *prompt resolution* of discrimination claims. EEOC's position undermines both objectives.

First, in order to justify a 300-day filing period, the state or local agency must be both *qualified* and *interested* in resolving the charge. The Colorado Commission (CCRD) here is neither. Colorado law has a six-month filing requirement so the charge was untimely. The CCRD therefore was without authority to investigate or remedy the alleged violations. *Mohasco Corp. v. Silver*, 447 U.S. 807 (1980) and *Oscar Mayer & Co. v. Evans*, 441 U.S. 750 (1979), often cited for the proposition that even untimely state charges can justify the 300-day filing period, have been misapplied by the lower courts. *Mohasco* concerned the impact of a *timely* (not, as here, an untimely) state charge on the federal 180-day filing period, and *Oscar Mayer* concerned the impact of an untimely state claim on a charge filed *within* (not, as here, beyond) the federal 180-day filing period. Neither case sheds any light on the question raised here, namely, the effect of an *untimely* state claim on a charge filed *beyond* the federal 180-day limit.

In addition to being not *qualified* to afford relief, the CCRD apparently was not *interested* either. The charge here fell within a class of charges which the worksharing agreement assigned to EEOC for processing. Accordingly, there was no deferral at all as contemplated by Congress. Thus, where such worksharing agreements exist, there are both statutory and contractual reasons why such agencies are not agencies "qualified to grant or seek relief."

Second, the interagency shuffle of charges and transmittal forms which occurred in this case—and which is typical of other worksharing arrangements—does not constitute either an initial institution or termination of state proceedings. In the absence of a realistic expectation that the state agency will participate in a substantive way in seeking a resolution of the charge, there is no legitimate reason for extending the normal federal filing period from 180 to 300 days.

The EEOC wants the best of both worlds. On the one hand, it wants to avoid state proceedings by securing waivers of the 60-day deferral period in worksharing agreements. On the other hand, it claims entitlement to the extended filing periods which were created for "only one reason"—that is, to give the states an opportunity to act. *Mohasco*, 447 U.S. at 821. The Commission's position thus sanctions delay in the filing of discrimination charges in situations where local resolution of the charges is either impossible or highly unlikely. Only by applying the normal 180-day filing period in cases where the state or local agency is unable or unwilling to act can Title VII's overriding objective of accomplishing the prompt resolution of employment discrimination charges be realized.

ARGUMENT

I. THE CHARGE IN THIS CASE DOES NOT QUALIFY FOR THE 300-DAY EXCEPTION TO THE NORMAL 180-DAY FILING REQUIREMENT BECAUSE CCRD IS NOT AN AGENCY HAVING "AUTHORITY TO GRANT OR SEEK RELIEF."

As this Court has observed in the past, §§ 706(c) [3] and (e) [4] of Title VII are "not ambiguous," and "a literal

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[3] Subsection 706(c) provides, in relevant part, that:

> In the case of an alleged unlawful employment practice occurring in a State, or political subdivision of a State, which has a State or local law prohibiting the unlawful employment practice alleged and establishing or authorizing a State or local authority to grant or seek relief from such a practice . . . no charge may be filed under subsection [(b)] of this section by the person aggrieved before the expiration of sixty days after proceedings have been commenced under the State or local law, unless such proceedings have been earlier terminated. . . .

42 U.S.C. § 2000e-5(c).

[4] Subsection 706(e) requires that a charge be filed within 180 days of occurrence, except that

> [I]n a case of an unlawful employment practice with respect to which the person aggrieved has initially instituted proceedings with a State or local agency with authority to grant or

reading of the two subsections gives full effect to the several policies reflected in the statute." *Mohasco v. Silver*, 447 U.S. 807, 818, 810 (1980). Subsection 706(c) requires that 706 agencies be afforded an "opportunity to consider" Title VII discrimination charges before they may be filed with the Commission. *Id.* at 810. In instances where the charging party "initially institutes" proceedings with a 706 agency having "authority to grant or seek relief" from the alleged unlawful practice, subsection 706(e) provides that the normal 180-day filing requirement is extended to 300 days in order to afford the charging party "a fair opportunity to invoke his state remedy without jeopardizing his federal rights." *Id.* at 813-814.

The plain meaning of these provisions is that a Title VII charge must be filed with the Commission within 180 days unless the charging party can show that the claim has been submitted to a 706 agency with both the authority and interest in seeking a resolution of the dispute. In such instances the charging party is afforded an additional 120 days to file with EEOC. If, on the other hand, the 706 agency lacks authority to resolve the claim (i.e., it is untimely or otherwise nonjurisdictional under state law), or is not interested in pursuing it (i.e., has waived initial processing rights), the extended filing period serves no statutory purpose and the normal 180-day limitation period applies. This rather straightforward reading not only gives full effect to the statutory language, but also furthers the dual Congressional objectives of giving "state agencies an opportunity to redress the evil at which the federal legislation was

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seek relief from such practice . . . such charge shall be filed by or on behalf of the person aggrieved within three hundred days after the alleged unlawful employment practice occurred or within thirty days after receiving notice that the State or local agency has terminated the proceedings under the State or local law, whichever is earlier. . . .

42 U.S.C. § 2000e-5(e).

aimed," while still encouraging the "prompt processing of all charges of employment discrimination." *Id.* at 821, 825.

A. The CCRD Is Not An Agency With Authority To Grant Or Seek Relief Because The Charge Was Not Timely Filed Under State Law.

Ms. Leerssen's charge was received by the EEOC 290 days after her termination and was referred to the CCRD four days later. Since Colorado law requires that charges be filed within six months of occurrence, the charge was untimely under state law and, as the CCRD subsequently informed Ms. Leerssen, the Division never had jurisdiction over her claim. Under these circumstances, the CCRD does not qualify as an agency with "authority to grant or seek relief" necessary to invoke the extended 300-day filing period.

The Court of Appeals below discounted the untimely state filing on the basis of its decision in *Smith v. Oral Roberts Evangelistic Ass'n, Inc.* 731 F.2d 684 (10th Cir. 1984), holding that a timely state filing is not required to activate the 300-day filing period. *EEOC v. Commercial Office Products Co.*, 803 F.2d 581, 586 n.3 (10th Cir. 1986). A split of authority has developed in the lower courts on this issue. While some courts have held that a timely state filing is required to qualify for the 300-day exception under Title VII,[5] the weight of

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[5] *See, e.g., Martinez v. United Automobile, Aerospace & Agricultural Implement Workers of America, Local 1373*, 772 F.2d 348 (7th Cir. 1985) (dictum); *Haag v. Board of Education*, 44 FEP Cases 1042 (N.D. Ill. 1987); *O'Young v. Hobart Corp.*, 579 F. Supp. 418 (N.D. Ill. 1983); *Graves v. Univ. of Michigan, Inst. of Continuing Legal Educ.*, 553 F. Supp. 532 (E.D. Mich. 1982); *Battle v. Clark Equipment, Brown Trailer Div.*, 524 F. Supp. 683 (N.D. Ind. 1981); *Gunn v. Dow Chemical Co.*, 522 F. Supp. 1172 (S.D. Ind. 1981); *Lowell v. Glidden-Durkee Div. of SCM Corp.*, 529 F. Supp. 17 (N.D. Ill. 1981); *Mills v. National Distillers Products Co.*, 435 F. Supp. 72 (S.D. Ohio 1977).

authority is to the contrary.[6] The conclusion that a timely state filing is not required often is based upon an overreading of this Court's cases in *Mohasco* and *Oscar Mayer & Co. v. Evans*, 441 U.S. 750 (1979). EEAC submits that the cases which require a timely state filing are better reasoned and more consistent with the statutory scheme envisioned by Congress when it established the deferral procedures in Title VII.

1. *Mohasco Corp. v. Silver*

Two footnotes in *Mohasco* often are cited in support of the conclusion that even an untimely state charge is sufficient to qualify for the extended 300-day filing period. The first is footnote 16 which reads in relevant part:

> [A] complainant in a deferral state having a fair employment practices agency over one year old *need only file his charge within 240 days* of the alleged discriminatory employment practice in order to insure that his federal rights will be preserved.

447 U.S. at 814 n.16 (emphasis added).

It is important to understand, however, that the charge in *Mohasco* was *timely* under state law because New York law allows 365 days to file a timely state charge. The significance of this crucial fact is that since the charge was timely the state agency in *Mohasco*—unlike the CCRD here—was one which still had "authority to

[6] *See, e.g., EEOC v. Shamrock Optical Co.*, 788 F.2d 491 (8th Cir. 1986); *Reedon v. District of Columbia*, 42 FEP Cases 782 (D.C. Cir. 1986); *Thomas v. Florida Power & Light Co.*, 764 F.2d 768 (11th Cir. 1985); *Howze v. Jones & Laughlin Steel Corp.*, 750 F.2d 1208 (3d Cir. 1984); *Smith v. Oral Roberts Evangelistic Ass'n, Inc.*, 731 F.2d 684 (10th Cir. 1984); *Rasimas v. Michigan Dept. of Mental Health*, 714 F.2d 614 (6th Cir. 1983), *cert. denied*, 466 U.S. 950 (1984); *Kocian v. Getty Refining & Marketing Co.*, 707 F.2d 748 (3rd Cir. 1983); *Jones v. Airco Carbide Chemical Co.*, 691 F.2d 1200 (6th Cir. 1982); *Platts v. Cardis Dow Corp.*, 558 F. Supp. 114 (S.D. Fla. 1983); *Soble v. Univ. of Maryland*, 572 F. Supp. 1509 (D. Md. 1983); and *Young v. Lockheed Missiles and Space Co., Inc.*, 504 F. Supp. 422 (N.D. Cal. 1980).

grant or seek relief" when the charge was deferred. In these circumstances the Court was quite right in noting that to ensure expiration of the 60-day deferral period within the federal 300-day limit, a timely state charge would have to be filed no later than 240 days after the occurrence. But that is a very different issue than the one presented here, namely, appropriate filing deadlines for charges which are *untimely* under state law and therefore ones over which the state agency is unable to afford relief.

In an extensive discussion of this fundamental distinction, Judge Rogers in *Dickerson v. City Bank and Trust Company*, 575 F. Supp. 872, 874-875 (D. Kan. 1983)[7] stated that:

> In our view it is critical to remember that the Court in *Mohasco* was not dealing with a factual situation where a state charge was untimely filed. The state filing period in *Mohasco* was 365 days. Thus, by stating that a complainant should have to file a charge within 240 days, the Court was not implying under the facts before it that an untimely state charge filed within 240 days of the violation would satisfy the statute.[8]

The second footnote in *Mohasco* often relied upon for the proposition that even an untimely state charge will activate the extended 300-day filing period is footnote 19. 447 U.S. at 816 n.19. There, this Court disagreed with

[7] EEAC is aware that *Dickerson* effectively was overruled by *Smith v. Oral Roberts Evangelistic Ass'n, supra.* Because that decision relies heavily upon what we believe to be an in incorrect interpretation of *Mohasco,* EEAC respectfully suggests that the district court opinion contains the better reasoned view of the law, and should be adopted by this Court.

[8] *Accord, Lowell v. Glidden-Durkee, Div. of SCM Corp., supra,* 529 F. Supp. at 21 ("In *Mohasco,* the plaintiff had initiated state proceedings *within* the state limitation period, which was one year. The Court did not decide whether failure to file within the state period could preclude application of the extended filing period.").

a rule set forth in *Olson v. Rembrandt Printing Co.*, 511 F.2d 1228 (8th Cir. 1975) which specified that no matter what the state limitation period may be (i.e. more or less than Title VII's 180 days), a charge *must* be filed with a state or local agency within 180 days in order to qualify for the extended 300-day period for filing with EEOC. In rejecting a blanket rule, this Court observed:

> [The language of Title VII] has been construed to require that the filing with the state agency be made within 180 days. *Olson v. Rembrandt Printing Co.* . . . Congress included *no express requirement that state proceedings be initiated by any specific date* in the portion of the subsection that relates to time limitations in deferral States. . . .

447 U.S. at 816 n.19 (emphasis added).

To acknowledge that state proceedings need not be initiated by any specific date in order to preserve federal rights, however, is *not* to say that state limitation periods may be ignored under Title VII's deferral provisions. As Judge Rogers noted in *Dickerson*:

> The Court's comments in footnote 19 may also be dismissed as impertinent. By refusing to adopt the approach of the 8th Circuit in *Olson* the Court did not rule that states' limitation periods could be ignored. Rather it held that *courts* could not establish limitation periods for initiating EEOC proceedings. In *Olson*, the circuit court determined that the failure to meet a 90-day state limitations period did not foreclose an extended period for filing a federal claim, *but* that all state claims must be filed within 180 days to gain the advantage of the extended federal filing period. The Supreme Court determined that the 180-day rule set out in *Olson* was not supported by the language of Title VII or Congressional intent. The Court, however, did not concern itself with the situation in the case at bar, where a state-imposed 180-day requirement has not been satisfied.

575 F. Supp. at 874-875. *Accord Lowell v. Glidden-Durkee, Div. of SCM Corp., supra*, 529 F. Supp. at 21-22. Thus, when a state filing period is longer than 180 days, footnote 19 provides that a Title VII charge filed more than 180 days after the occurrence which is timely under state law *may* be timely under federal law as well (assuming compliance with the 300-day limit); footnote 19 does *not* say that a charge filed beyond the normal 180 day federal limit which is also untimely under state law will be entitled to the 300-day extension.

Footnotes 16 and 19 in *Mohasco* thus address concerns very different from appropriate Title VII filing deadlines for charges untimely under state law. Courts which rely upon them for the conclusion that untimely state filings may activate the extended 300-day filing period significantly overread their intended scope.

2. *Oscar Mayer & Co. v. Evans*

Oscar Mayer & Co. v. Evans, 441 U.S. 750 (1979) also has been relied upon as authority for the conclusion that even an untimely state claim is sufficient to activate the extended 300-day filing period for federal claims. As discussed below, however, that issue was not raised or discussed in *Oscar Mayer* because the federal claim there was filed *within* 180 days of the occurrence. This Court was not asked to speculate as to what the result might have been had the federal charge there—as here—been filed between 180 and 300 days after the alleged unlawful conduct.

In *Oscar Mayer*, a case arising under the Age Discrimination in Employment Act of 1967, 29 U.S.C. §§ 621 *et seq.* (ADEA), this Court held that an ADEA plaintiff in a deferral state is not required to file a timely state charge "in order to preserve the federal right of action." 441 U.S. at 753. The plaintiff filed a notice of intent to sue (the predecessor to the EEOC charge) with the Secretary of Labor well within the 180-day period for filing

such notices, but had not filed a charge with the state deferral agency. *Id.* at 754. The Court ruled that under the ADEA, a plaintiff in a deferral state must file a charge with the state agency, *id.* at 758, but that failure to do so in a timely fashion would not preclude *federal relief*, at least where the state filing period was shorter than the federal filing period. *Id.* at 759. Because the plaintiff had filed his notice of intent to sue within 180 days the *Court did not rule on the effect of an untimely state filing on the availability of the 300-day extended federal filing period.*[9]

The language of the *Oscar Mayer* opinion indicates unmistakably that the Court was concerned with the effect of an untimely state filing on the availability of a federal *cause of action* under the ADEA, not on the availability of the extended *federal filing period*:

> Nothing whatever in [Section 14(b)] requires the respondent here to commence [state] proceedings within the 120 days allotted by Iowa law in order to *preserve a right of action* under § 7(c).

441 U.S. at 759 (emphasis added).

> [T]here is no requirement that, in order to commence state proceedings and thereby *preserve federal rights*, the grievant must file with the State within whatever time limits are specified by state law.

Id. (emphasis added).

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[9] This critical fact is not mentioned in any of the appellate decisions which rely on *Oscar Mayer* to conclude that an untimely state filing may activate the 300-day extended filing period under Title VII and the ADEA. *See, e.g., Smith v. Oral Roberts Evangelistic Assn., Inc.*, 731 F.2d 684 (10th Cir. 1984); *Aronsen v. Crown Zellerbach*, 662 F.2d 584 (9th Cir. 1981); *Goodman v. Heublein, Inc.*, 645 F.2d 127 (2d Cir. 1981); *Jones v. Airco Carbide Chemical Co.*, 691 F.2d 1200 (6th Cir. 1982); *Davis v. Calgon Corp.*, 627 F.2d 674 (3d Cir. 1980); *Bean v. Crocker National Bank*, 600 F.2d 754 (9th Cir. 1979).

> [S]tate procedural defaults cannot *foreclose federal relief* and . . . state limitations periods cannot govern *the efficacy of the federal remedy.*

Id. at 762 (emphasis added). Plainly, the Court in *Oscar Mayer* held that shorter state filing periods could not be used to shorten the federal limitation period, not that state filing periods equal to the federal 180-day period could be ignored.

To summarize, *Mohasco* dealt with the issue of a timely state charge filed *beyond* the normal federal 180-day limit; *Oscar Mayer* dealt with the issue of an untimely state charge filed *within* the normal federal 180-day limit. Neither case dealt with the precise issue here—an untimely state charge filed *beyond* the normal federal 180-day limit. Since the untimeliness of the state claim means that the CCRD was not authorized to grant or seek relief, Ms. Leerssen's charge, on its face, does not qualify for the extended 300-day filing period.[10]

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[10] In several recent cases, the courts of appeals have recognized that *Mohasco* and *Oscar Mayer* are not determinative, and have acknowledged the logic of requiring a timely state filing. Their decisions to the contrary have been based more upon a desire to maintain inter-circuit consistency in Title VII practice than upon a belief in the merits of the result. *See, e.g., Maurya v. Peabody Coal Co.*, 44 FEP Cases 281 (6th Cir. 1987) ("The cases decided in this circuit reached [the conclusion that timely state filing is not required] by making an analogy to the Supreme Court's decision in *Oscar Mayer & Co. v. Evans* . . ., a case involving not Title VII but the [ADEA]. Although one may question . . . the wisdom of this rule as well as the *Oscar Mayer* analogy, this panel is not free to do so as we are bound by *Jones* and *Rasimas*."); *EEOC v. Shamrock Optical Co.*, 788 F.2d 491, 495 (8th Cir. 1986) ("To permit EEOC enforcement of a complaint that is not timely filed with the state deferral agency permits complainants to ignore state remedies without penalty. It further favors deferral state over non-deferral state complainants, even when those in the deferral state bypass the local mechanism."); *Thomas v. Florida Power & Light*, 764 F.2d 768, 770 (11th Cir. 1985) ("To require the institution of proceedings with a state or local agency with authority to grant relief as a condition to getting the extended 300 days, but not require plaintiff

B. The CCRD Is Not An Agency With Authority To Grant Or Seek Relief Because It Has Contractually Relinquished Its Right To Process The Charge.

Paragraph 10 of the worksharing agreement between CCRD and EEOC provides that:

> In order to avoid delay as to [certain categories of charges including the one filed by Ms. Leerssen] . . . CCRD hereby waives its exclusive right to process those charges for 60 days as provided in Section 706(c) of Title VII of the Civil Rights Act, as amended, so that EEOC can take immediate action on such charges. . . .

Through this provision the CCRD effectively has relinguished whatever authority it might otherwise have had to grant or seek the relief requested in Ms. Leerssen's charge. Accordingly, when EEOC transmitted the charge to CCRD, it was not referred to an agency with "authority to grant or seek relief" as required to activate the 300-day filing period.

In *Douglas v. Red Carpet Corp. of America*, 538 F. Supp. 1135 (E.D.Pa. 1982) the court analyzed an agreement similar to the one in this case and concluded that the local agency effectively had relinquished deferral status over charges assigned to EEOC:

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to institute those proceedings within the state's limitation period, defeats the purpose of deferral. Obviously, filing an untimely claim with a state or local agency is a meaningless gesture because the agency does not have the authority to grant relief on an untimely claim.") The court in *Thomas* stated further that "Whatever the merits of that and other arguments to support the district court's decision [that the charge was untimely], however, there is more merit in having federal courts follow the same course in cases of this kind in order to establish country-wide uniformity in the application of merely regulatory statutes and regulation." 764 F.2d at 770. These decisions suggest that there may not nearly be the unanimity of view among the lower courts concerning the merits of the statutory interpretation applied in these cases as might be suggested by a simple mathematical tabulation of results.

> Under these circumstances, where the relevant state agency has, through a Worksharing Agreement negotiated with and entered into by the EEOC, waived its right to first consider the plaintiff's complaint, the state deferral requirement of Title VII, 42 U.S.C. § 2000e-5(c) becomes meaningless. In effect because of the Worksharing Agreement, *Pennsylvania is a deferral state only in connection with those charges which are encompassed within Paragraph III(c) of the Worksharing Agreement* [i.e., those charges over which the state agency has assumed initial processing responsibility].

538 F. Supp. at 1139 (emphasis added). *Contra, Stiessberger v. Rockwell Int'l Corp.*, 29 FEP Cases 1273, 1274 (E.D. Wash. 1982).

Admittedly, the waivers in most worksharing agreements are not absolute. The participating agencies often retain the right to rescind initial processing waivers with regard to specific charges, or (as was done here by CCRD) reserve the option of reviewing final determinations reached by the other agency. Where a 706 agency elects to investigate a particular charge which falls within a class of charges which the worksharing agreements assigns to EEOC (and the charge is timely under state law), the requirements for the extended 300-day federal filing period would appear to be satisfied. In contrast, the remote possibility that a 706 agency may one day disagree with the findings of an EEOC investigation should not be permitted to obscure the overriding purpose of worksharing agreements which is to eliminate duplications of effort. A determination that the 300-day limit should be available for all charges simply because a state agency has retained the right to review the quality of federal investigations would surely be an instance of a very small tail wagging a very large dog.

Since both the untimely state filing and the provisions of the worksharing agreement deprived the CCRD of "authority grant or seek relief," Ms. Leerssen did not

qualify for the 300-day exception to the normal 180-day filing period. As appropriately stated by the district court in *Dixon v. Westinghouse Electric Corp.*, 615 F. Supp. 538 (D.Md. 1985):

> Where the state or local deferral agency is not empowered or authorized to act, either because of statutory or contractual limitations, there is no reason to allow additional time for filing charges under § 706(e). *See Mohasco*, 447 U.S. at 821 . . . As it did in *Lopez*, the court will tie the availability of the expanded period for filing in Maryland to the purpose of the statute which is for the state agency to be afforded the opportunity to act on a charge of discrimination before the EEOC does. The Court will not arbitrarily permit plaintiffs in states with deferral agencies, not authorized to process certain claims, more time to file such claims merely because the deferral agency exists. Section 706(e) facilitates the exhaustion of state remedies, *see Citicorp*, 658 F.2d at 234, but it has no effect when the state deferral agency is without authority to process a claim or where it is contractually precluded from doing so. *See Lopez*, 493 F. Supp. at 805.

615 F. Supp. at 542.

II. THE CHARGE IN THIS CASE DOES NOT QUALIFY FOR THE 300-DAY EXCEPTION TO THE NORMAL 180-DAY FILING REQUIREMENT BECAUSE IT WAS NOT "INITIALLY INSTITUTED" WITH THE CCRD.

This Court has emphasized that the whole purpose of including in Title VII a 300-day exception to the normal 180-day filing requirement is the assumption that resort to state or local agencies will obviate the need for federal intervention. As stated in *Mohasco*:

> The history identifies only one reason for treating workers in deferral States differently from workers in other States: to give state agencies an opportunity to redress the evil at which the federal legislation was aimed, and to *avoid federal intervention unless its need was demonstrated.*

447 U.S. at 821 (emphasis added). Again in *Oscar Mayer*:

> Congress intended through § 706(c) . . . to give state agencies a limited opportunity to resolve problems of employment discrimination and thereby *to make unnecessary, resort to federal relief* by victims of the discrimination. [Citations omitted].

441 U.S. at 755 (emphasis added).

Of course, federal intervention can be avoided only if the state or local agency's consideration of a deferred Title VII charge is active and substantive. The simple docketing of a charge by a state agency and resubmission to EEOC for processing as occurred in this case clearly does nothing to minimize federal intervention. For this reason, Congress in § 706(e) made availability of the extended 300-day filing period contingent not only upon the existence of a state or local agency with "authority to grant or seek relief," but also upon a requirement that proceedings be "initially instituted" with that agency. Thus, in order for the extended filing period to serve any meaningful purpose, there must be a realistic expectation when a charge is deferred that the state or local agency will assert jurisdiction over the charge and actively seek its resolution. *Dixon v. Westinghouse Electric Corp.*, 787 F.2d 943, 946 (4th Cir. 1986).

Here it is abundantly clear that both EEOC and CCRD anticipated from the outset that the charge would be processed by federal rather than state authorities. The EEOC commenced its investigation on March 26, 1984, four days *before* it was referred to the CCRD. In the transmittal form accompanying the charge, EEOC expressed its intention to conduct the investigation, and CCRD indicated its acquiescence. Clearly, this bureaucratic paper shuffle cannot realistically be compared with

the type of substantive state investigation contemplated by Congress when it extended by 120 days the normal federal filing period.

The crucial point is that with regard to charges over which 706 agencies have waived initial processing privileges in worksharing agreements, EEOC's transmittal is simply for informational purposes, and is not done with any realistic expectation of initiating a § 706(e) substantive proceeding. This conclusion clearly is reflected in the EEOC regulations in effect when Ms. Leerssen's charge was processed.

Since Ms. Leerssen's charge was untimely under Colorado law, it was processed in accordance with 29 C.F.R. § 1601.13(a)(3) of the Commission's regulations which provides that:

> Charges arising in jurisdictions having a 706 Agency but which charges are apparently untimely under the applicable state or local statute of limitations are *filed with the Commission upon receipt.* Such charges are timely filed if received by the Commission within 300 days from the date of the alleged violation. Copies of all such charges will be *forwarded* to the appropriate 706 Agency. (emphasis added).

Two aspects of the regulation are significant. First, the charge is considered filed with EEOC *immediately upon receipt*, not at the conclusion of the deferral period as contemplated by § 706(e). Second, the charge is "*forwarded*," not "deferred" to the appropriate 706 agency. Similar treatment is afforded to charges which are timely under state law, but over which the 706 agency has waived initial processing rights in a worksharing agreement. They too are deemed to be filed with the Commission "upon receipt," 29 C.F.R. § 1601.13(a)(5)(ii)(A), and copies are to be "forwarded" not "deferred" to the appropriate 706 agency. 29 C.F.R. § 1601.13(a)(4)(iii).

Significantly, the Commission's regulations accord far different treatment to the types of charges which Congress clearly had in mind when the deferral provisions were established, namely, charges *timely* under state law and ones over which the 706 agency has *not* waived initial processing rights. Under 29 C.F.R. § 1601.13(a)(5)(i)(A)-(C), such charges are "deferred" (not forwarded) to the appropriate 706 agency, a process which includes time stamping the charge, transmitting it to the 706 agency in most instances by certified or registered mail, and by providing written notification to the charging party. Significantly, such charges are not considered filed with EEOC until the expiration of the 60 (or where appropriate 120) day deferral period, until the 706 agency terminates its proceedings, or until the agency waives its processing rights, whichever occurs first. 29 C.F.R. § 1601.13(a)(5)(ii)(B).

These differences which appear in EEOC's own regulations (*i.e.* immediate v. delayed filing with EEOC and informal forwarding vs. formal deferral to the 706 agencies) strongly support the conclusion reached by the Fourth Circuit in *Dixon v. Westinghouse Electric Corp.* that when a 706 agency waives its right to initially process a charge (or when the charge is untimely under state law), the Commission does not contemplate that the local agency will "play a substantive role in processing the charge." 787 F.2d at 946. In such instances, the charge transmittal to the 706 agency is for informational purposes only and does not constitute an initial instituting of the case with the 706 agency. *Id.*[11]

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[11] On March 31, 1987, EEOC amended its regulations by conforming the processing of untimely state charges to the procedures described above for processing timely state charges. 52 Fed. Reg. 10224 (1987). The differences predicated upon whether the 706 agency has waived initial processing rights in a worksharing agreement, however, remain. Charges encompassed by a waiver—such as Ms. Leerssen's charge here—continue to be filed "upon receipt" and are "forwarded" rather than deferred to the 706 agency. Accord-

As noted earlier, the Fourth Circuit in *Dixon* focused on the impact of worksharing agreements on the "commencement" of state proceedings, while the Tenth Circuit below analyzed the effect of a nearly identical agreement on the commencement and "termination" of such proceedings. These issues, of course, are two sides of the same coin. If, as we suggest, the approach in *Dixon* is correct and proceedings before the CCRD were never initially instituted, then the question of what constitutes a termination need not be decided. On the other hand, if the informational transmittal to CCRD here is considered sufficient to institute state proceedings under § 706(e), then the court below certainly was correct in concluding that CCRD's retention of jurisdiction pending EEOC's investigation was adequate to preclude a termination of the state action.

CONCLUSION

The EEOC cannot have it both ways. It cannot short circuit the 60-day deferral process through state agency waivers in worksharing agreements on the one hand and then claim entitlement to the extended 300-day filing period on the other. EEAC does not quarrel with the concept of worksharing agreements and agrees that in many instances a sharing of initial processing responsibilities is highly desirable. But if a 706 agency is not going to participate in the substantive investigation of a charge, the whole reason for providing an exception to the normal 180-day filing period dissolves.[12]

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ingly, the conclusion reached above that Ms. Leersen's charge was not "initially instituted" with the CCRD would apply even under the amended regulations.

[12] The Solicitor General suggests that the decision below "turns on its head the very purpose of Title VII's deferral requirement: *deference to state fair employment practice agencies.*" Br. at 23 (emphasis added). According to the government, as long as the state agency has a "chance" or "opportunity" to act, the statutory purpose is fulfilled. Br. at 20-21 & n.15. Under this view, even a decision *of* the agency to *decline* to initially investigate a charge *expands* the charge filing period from 180 to 300 days. We submit that it is the government, rather than the court below, that has turned the statute upside down by suggesting that the extended filing period in § 706(e), which "was intended to prevent forfeiture of a complainant's federal rights *while participating in state proceedings*", *Mohasco*, *supra* at 447 U.S. 821 (emphasis added), applies even when a state decides not to process a charge.

As noted earlier, Congress sought through Title VII's deferral process to give state agencies "an opportunity to redress the evil at which the federal legislation was aimed," while still encouraging the "prompt processing of all charges of employment discrimination." *Mohasco*, *supra*, 447 U.S. at 821, 825. EEOC's position in this case undermines both objectives. Through a fictitious "initiation" and "termination" of proceedings, the Commission seeks to give the appearance but not the substance of state review; and through a claimed entitlement to the 300-day filing period, the Commission seeks to provide charging parties with additional time to commence proceedings for no reason other than the irrelevant fact that they arise in deferral jurisdictions, even though no meaningful deferral is contemplated or takes place. Certainly the ends of Title VII are better served through a rule which provides that in the absence of a state or local agency having both the *authority* and *interest* in processing a charge, all claims must be filed within 180 days.

It has been stated that a rule permitting a 300-day filing period in deferral jurisdictions is consistent with the remedial purposes of "a statutory scheme in which laymen, unassisted by trained lawyers, initiate the process." *E.g.*, *EEOC v. Shamrock Optical Co.*, 788 F.2d 491, 493 (8th Cir. 1986) (quoting *Love v. Pullman Co.*, 404 U.S. 522, 527 (1972). There are two responses to this observation. First, the automatic sanctioning of a 300-day filing period in all deferral jurisdictions effectively rewrites the statute to provide one limitations period for deferral jurisdictions and another for nondeferral

jurisdictions. As this Court previously has observed, had that been the design of Congress Title VII easily could have been drafted with dual limitations periods. *Mohasco, supra* 447 U.S. at 821.

Second, this Court in *Mohasco* also rejected the assumption that the average person in a deferral jurisdiction would understand the statute to allow a 300-day filing period:

> The unfairness argument is based on the assumption that a lay person reading the statute would assume that he had 300 days in which to file his first complaint with either a state or federal agency. We find no merit in this argument. We believe that a lay person would be more apt to *regard the general obligation of filing within 180 days as the standard of diligence* he must satisfy, and that one who carefully read the entire section would understand it to mean exactly what it says.

447 U.S. at 825 (emphasis added). EEAC agrees. The words of the statute are not ambiguous. In the absence of the "initial institution" of a substantive proceeding with a state or local agency "authorized to grant or seek relief," a Title VII charge must be filed within 180 days. Only in this manner can the Congressional desire for a prompt resolution of employment discrimination claims be realized.

Respectfully submitted,

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